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IN THE

Supreme Court of the United States

THERM-ALL INC., PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit, *sua sponte*, reversed its Initial Order that had vacated the district court's conviction of Petitioner; and, in so doing, acknowledged and recognized there is a conflict amongst the circuit courts regarding the issue of what is the requisite proof necessary to satisfy the five year statute of limitations for a conviction under the Sherman Act, 15 U.S.C. §1.

The Fifth Circuit, in wrestling with the conflicts amongst the circuit courts and this Court's decision in *United States v. Kissel*, 218 U.S. 601 (1910), and admittedly considering the issue as **res nova** for the court, inexplicably reversed its Initial Order and issued a Revised Order that left little guidance as to the quandary yet resolved.

This claim challenges the Fifth Circuit's application of the unsettled law as to what is an "overt act" and what is the Government's burden of proof in regards to establishing the "overt act" during the limitations period to the facts of the instant matter. Further, the Fifth Circuit in its Revised Order, while attempting to ferret out the conflict amongst the circuit courts, misquotes the one sentence of testimony it eventually relied upon to find an "overt act" and issue its reversal. Ironically, yet critical, the Fifth Circuit correctly quoted this exact sentence in its Initial Order vacating the conviction of Therm-All.

The questions presented, therefore, are:

1. To sustain a conviction under the Sherman Act, is it necessary to prove through an "overt act" that the price fixing conspiracy continued to exist

during the limitations period or is the agreement to conspire requisite proof in itself?

2. What is an "overt act" to establish a violation of the Sherman Act in the limitations period and is a conclusory statement, without benefit of substantiation or supporting evidence, an "overt act" for purposes of establishing the violation of the Sherman Act during the statute of limitations period?

3. Did the Fifth Circuit's inexplicable misquote of the record, which it had previously quoted correctly in its Initial Order, nullify its basis for *sua sponte* issuing a Revised Order since it was the sole "overt act" it relied upon to reverse its Initial Order vacating the conviction of Therm-All?

PARTIES TO THE PROCEEDINGS

Rule 29.1

Petitioner Therm-All, Inc. was incorporated under the laws of the State of Ohio on February 19, 1981. It has no parent corporation. There are no subsidiaries or affiliates. It issues no stock and its only shareholder is its president Robert L. Smigel.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 3

REASONS FOR GRANTING THE PETITION 5

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING IF IT IS NECESSARY TO PROVE AN OVERT ACT WAS COMMITTED DURING THE FIVE YEAR LIMITATIONS PERIOD FOR A CONVICTION UNDER THE SHERMAN ACT. 7

A. CONFLICT WITH THE SIXTH CIRCUIT'S DECISION IN *UNITED STATES V. HAYTER OIL CO., INC. OF GREENVILLE, TENNESSEE*, 51 F.3D 1265 (6TH CIR. 1995) 7

B. NEARLY A CENTURY LATER AND THIS COURT'S DECISIONS IN *NASH V. U.S., SUPRA* AND *U.S. V. KISSEL,*

SUPRA ARE STILL SUBJECT TO MIXED INTERPRETATIONS. 9

II. THE FIFTH CIRCUIT'S SUA SPONTE REVERSAL WAS DONE WITHOUT DEFINING "OVERT ACT" AND WAS PREMISED UPON A MISQUOTE THAT WAS THE SOLE PIECE OF EVIDENCE RELIED UPON TO FIND AN "OVERT ACT" DURING THE LIMITATIONS PERIOD.. 12

A. WITHOUT DEFINING "OVERT ACT" THE CIRCUIT COURT REVERSED ITS INITIAL ORDER AND IMPROPERLY FOUND THE CONCLUSORY TESTIMONY OF WALLY RHODES IS AN OVERT ACT..... 13

B. THE CIRCUIT COURT MISQUOTED THE ONE SENTENCE TESTIMONY OF WALLY RHODES AND RELIED UPON THE SAME TO REVERSE ITSELF..... 15

CONCLUSION..... 18

APPENDIX

REVISED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JUNE 14, 2004 ..... 1a

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED DECEMBER 3, 2003 ..... 30a

MEMORANDUM AND ORDER OF THE U.S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED JUNE 10, 2002 ..... 47a

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JULY 14, 2004 DENYING PETITION FOR PANEL REHEARING 110a

APPELLANTS' JOINT PETITION FOR PANEL REHEARING DATED JUNE 25, 2004..... 112a

TABLE OF AUTHORITIES

Page

CASES

Grunewald v. United States, 333 U.S. 391 (1957) 8

Nash v. U.S., 229 U.S. 373, 378 ..... *passim*

United States v. Manges, 110 F.3d 1162 at 1169 (5th Cir. 1997) 8

U.S. v. Nippon Paper Industries Co., Ltd. 62 F.2d 173 at 179 ..... 14, 18, 19

U.S. v. Socony-Vacume Oil Co., 310 U.S. 150 ..... 8, 11

U.S. v. Spinney, 65 F.3d 231, 234 (1st Cir. 1995) 14, 18, 19

United States v. Hayter Oil Co., Inc. of Greenville, Tennessee, 51 F.3d 1265 (6th Cir. 1995) 7, 8, 10, 12

United States v. Kissel, 218 U.S. 601 (1910) ..... *passim*

Yates v. United States, 354 U.S. 298 (1957) 14

OTHER AUTHORITIES

Webster's II, New College Dictionary, at 1211, 1995 17

15 U.S.C. §1 ..... 3, 8

18 U.S.C. §3282 ..... 3, 16

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Fifth Circuit is reported at *United States of America v. Therm-All, Inc. and Supreme Insulation, Inc.*, 352 F.3d 924 (5th Cir. 2004). In its Revised Order, the Fifth Circuit affirmed the decision of the United States District Court for the Southern District of Texas, reported at Opinion December 3, 2003, 5th Cir. 2003, _____ F.3d _____). See Appendices 1a and 30a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Fifth Circuit's opinion was rendered on June 14, 2004. The Petitioner filed a Motion for Rehearing on June 25, 2004. See 112a. The Fifth Circuit denied Petitioner's Motion for Rehearing on July 14, 2004. See 110a.

RELEVANT PROVISIONS INVOLVED

Title 15 United States Code, Section 1.

Section 1. Trusts, etc., in restraint of trade illegal; penalty.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who

shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Title 18 United States Code, Section 3282.

Section 3282. Offenses not capital.

(a) In general. Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT

On May 31, 2000, Petitioner, Therm-All, Inc. ("Therm-All") was indicted by a federal grand jury alleging that Therm-All conspired to fix prices in the metal building insulation industry in violation of Section 1 of the Sherman Act, 15 U.S.C. §1; subsequently Therm-All was convicted of said indictment.[1] The Fifth Circuit Court of Appeals reversed and vacated the conviction of Therm-All holding that the United States of America ("Government") failed to prove that Therm-All had committed an "overt act" to establish the price fixing agreement existed subsequent to May 31, 1995, and during the five year statute of limitations period as prescribed in 18 U.S.C. §3282. See Initial Order p. 12.

Within the Initial Order, the Fifth Circuit reviewed and rejected the five pieces of evidence the Government relied upon in its argument that it had proved that Therm-All committed an "overt act" during the limitations period. See Initial Order p. 8-12.[2] Most pointedly for this analysis, the Fifth Circuit considered and rejected the Government's argument that the one sentence testimony of co-conspirator Wally Rhodes

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[1] Supreme Insulation, Inc., Robert L. Smigel (president of Therm-All) and Tula D. Thompson (president of Supreme) were also indicted in the same Indictment. Supreme was also convicted, yet Defendants Smigel and Thompson were acquitted.

[2] It should be noted that the Government in its Reply Brief, as well as its Motion for Petition for Rehearing En Banc, continued to aver that a proof of an overt act during the limitations period is not necessary to sustain a conviction under the Sherman Act. This point is critical for the Government, now as Respondent, cannot genuinely argue that there is not a conflict amongst the circuit courts for it was the very gravesman upon which its Petition for Rehearing En Banc was premised.

"that the agreement lasted until June 1995" and found that it was merely conclusory testimony and not evidence of an "overt act" within the statute of limitations for Rhodes did not testify about any acts after May 31, 1995 to substantiate his opinion. See Order p. 9.

However, *sua sponte*,[3] the Fifth Circuit issued a Revised Order affirming the conviction of Therm-All and held that the Government had indeed satisfied its burden of proving the conspiracy continued to exist after May 31, 1995.[4] Specifically, the Fifth Circuit, after a lengthy analysis of the unsettled law amongst the circuit courts as to whether an overt act is necessary to show a conspiracy continued into the limitations period, did a complete 180° turn and held that Rhodes' conclusory testimony was, in fact, direct evidence of an "overt act." See Initial Order p. 16. Sadly and unjustly, in this about face of its early analysis, the Fifth Circuit misquoted and misstated the very evidence it relied upon to issue the Revised Order; to wit, the Fifth Circuit misquoted Rhodes' testimony as "the conspiracy continued through June 1995". (Emphasis added) See Revised Order p. 16.

How or why the Fifth Circuit correctly quoted Rhodes' testimony in its Initial Order, yet misquoted

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[3] The Government's Motion was for a Petition for Rehearing En Banc. (Emphasis added) The three judge panel circumvented the Government's Petition and on its own volition issued a Revised Order prior to and without the full panel of the Fifth Circuit reviewing the matter en banc as requested by the Government.

[4] It should be noted that the Fifth Circuit, upon the reversal of its Initial Order, also considered and rejected the other five issues raised by Therm-All in its initial appeal to the Court; none of which are the premise for the instant Petition for a Writ of Certiorari.

the same in its Revised Order is lost upon Therm-All. But, the significance should not be lost upon this Court for it is the sole piece of evidence the Fifth Circuit relied upon in its search for symmetry amongst the circuit courts and subsequent reversal of its Initial Order and analysis.

In addition, the Fifth Circuit failed to define what is an "overt act" nor could cite to a definition of "overt act" from prior court rulings.

REASONS FOR GRANTING THE PETITION

Three significant and undisputed factors should compel this Honorable Court to receive Therm-All's Petition for Writ of Certiorari. First, as previously stated, the Fifth Circuit openly acknowledged that there lies a conflict within the circuit courts as to the issue of whether the Government's obligation to produce evidence of an "overt act" to prove the conspiracy continued during the limitations period to sustain a conviction under the Sherman Act. See Revised Order p. 13-15. To state the obvious, such an ambiguity must be resolved by this Court so to avoid any further quandaries amongst the circuit courts whether proof of an "overt act" is necessary to establish a conspiracy continued through the limitations period, whether a conspiracy continues ad infinitum until abandoned or terminated, or whether once a conspiracy is established no further proof is necessary to prove a violation of the Sherman Act. These are questions unanswered by common thread through the circuit courts and therefore, necessitate determination by this Court.

Second, the mere fact that the Fifth Circuit found the issue to be **res nova** is compelling and echoes the cry for resolve by this Court. The Sherman Act has been in effect since its enactment by the 51st Congress in 1890. In 1910 (*Kissel, supra*), this Court first addressed the requirements for burden of proof required under the Sherman Act. Yet, nearly a century later, the circuit courts, and particularly the Fifth Circuit, are without guidance or clarity to resolve the issue of what proof is required to sustain a conviction under the Sherman Act during the limitations period.

Third, and in conjunction with review of the Fifth Circuit's misquote of Rhodes' testimony, it is incumbent upon this Honorable Court to define what is an "overt act" for purposes of proving a violation of the Sherman Act during the limitations period. In so doing, determine whether the Fifth Circuit's reliance upon the conclusory testimony of Rhodes is an "overt act".

Fourth, and finally, the Fifth Circuit's flip flop and subsequent misquote of the evidence of an "overt act" clearly magnifies the Fifth Circuit Court's struggle to steadfastly determine what evidence is required to sustain a conviction under the Sherman Act. This is not an instance of a factual dispute amongst the parties, which is rarely meritorious of the allowance for Writ of Certiorari. Rather, this is a unique situation where the circuit court correctly cites to a quote in its Initial Order yet inexplicably misstates the exact same quote in its Revised Order. In both instances, the Circuit Court Order hinged upon that critical quote in its analysis of whether an "overt act" was established to show direct evidence of the conspiracy's existence during the limitation period.

Review of this case is essential to resolve an issue left muddled for nearly a century and, in turn, without commonality amongst the circuit courts. Further, review is also necessary to define what is an overt act, as well as address the Fifth Circuit Court's baffling misstatement of a fact that it had previously cited true and is the sole piece of evidence upon which the Fifth Circuit Court relies to ascertain if an "overt act" has been proven.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING IF IT IS NECESSARY TO PROVE AN OVERT ACT WAS COMMITTED DURING THE FIVE YEAR LIMITATIONS PERIOD FOR A CONVICTION UNDER THE SHERMAN ACT.

A. Conflict With The Sixth Circuit's Decision In *United States V. Hayter Oil Co., Inc. Of Greenville, Tennessee*, 51 F.3d 1265 (6th Cir. 1995).

The Fifth Circuit openly acknowledged and recognized there lies a conflict within the circuit courts regarding whether it is necessary for the Government to produce evidence (overt act) that the conspiracy continued to exist during the limitations period. See Revised Order p. 13-15, see also Initial Order p. 6-7.[5] To the point Hayter *Oil* held, in part: "However, once a conspiracy has been established, it is presumed to continue until there is an affirmative showing that it has been abandoned." *Supra*, at 1270-71. In addition,

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[5] The Fifth Circuit cited this quote in its Initial Order at p. 6-7, but chose to ignore it in its analysis of the conflict in *Hayter Oil* in its Revised Order.

the *Hayter Oil* court, citing to *U.S. v. Socony-Vacume Oil Co.*, 310 U.S. 150, and *Nash v. U.S.*, 229 U.S. 373, 378, also held: "Proof of an overt act is not required to establish a violation of Section 1 of the Sherman Act." *Supra*, at 1270.

Therefore, what is pointedly clear, and the Fifth Circuit recognized, is that the decision in *Hayter Oil* is in direct conflict, in two regards, with the Fifth Circuit's holding in the case at bar.[6]

First, *Hayter Oil* held that proof of an overt act is not necessary to establish a violation of §1 of the Sherman Act while the Fifth Circuit's decision requires proof of an overt act to show the conspiracy's existence through the limitations period. Second, *Hayter Oil* assumes the conspiracy continues until its abandonment therefore placing no burden upon the Government to show proof of an overt act and in so doing, placing the burden upon the accused to show abandonment. Contrarily, the Fifth Circuit squarely puts the burden upon the Government to show proof of an overt act during the limitations period to establish a violation of §1 of the Sherman Act.

The Sherman Act does not specifically address what proof is necessary to establish a violation of §1 during the limitations period; thereby leaving the burden upon the courts to decide a bright line rule. Unfortunately, there is no commonality or uniformity amongst the circuit courts as to this issue. Therefore, it

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[6] It should be noted that the decision in *Hayter Oil* is also in conflict with the holdings in *United States v. Manges*, 110 F.3d 1162 at 1169 (5th Cir. 1997) and *Grunewald v. United States*, 333 U.S. 391 (1957).

is incumbent that this Court resolve the conflict amongst the circuit courts and determine once and for all, with clarity, whether it is necessary for the Government to produce evidence, through an overt act, that a conspiracy continued through the limitations period to sustain a conviction under the Sherman Act.

Unless and until this Honorable Court resolves this issue, it is inevitable that future circuit courts will be faced with the dilemma confronted by the Fifth Circuit which will only further muddle an already unsettled area of law.

B. Nearly A Century Later And This Court's Decisions In *Nash V. U.S., Supra* And *U.S. V. Kissel, Supra* Are Still Subject To Mixed Interpretations.

In its analysis of this issue, the Fifth Circuit specifically addressed this Court's decision in *Kissel, supra.* The Court in *Kissel* held, in part, that "if [the defendants] do continue such efforts in the pursuance of the plan, the conspiracy continues up to the time of abandonment or success." *Kissel, supra* at 608. The Fifth Circuit openly acknowledged that this Court's decision in *Kissel, supra,* concerning the proof of a conspiracy during the limitations period is open to two interpretations nearly a century after it was rendered. See Revised Order p. 8-9. (Emphasis added)

The Fifth Circuit interpreted the *Kissel* decision to mean: "Under the second interpretation, once a conspirator has committed an act of continuing effort, the conspiracy would continue from the point of the original conspiratorial agreement until the last act of

continuing effort." See Revised Order p. 9. In adopting this interpretation, the Fifth Circuit rejected the alternative interpretation that the conspiracy is indefinitely actionable after the first act or, in other words, until proof of abandonment or cessation. See Revised Order p. 9-10.

Whether the Fifth Circuit interpretation is accurate or amiss is not the ultimate issue at hand. The mere fact that the Fifth Circuit was left to decide from alternative views of the *Kissel* holding is a clear indication that the issue is yet resolved and therein lies the conflict amongst the circuit courts as evidenced by the decision in *Hayter Oil, supra.*

The unsettled nature of this issue is further illustrated by this Court's decision in *Nash, supra,* where in addressing the issue of whether proof of an overt act is necessary to uphold a conviction under the Sherman Act, the Court held: ". . . the Sherman Act punishes the conspiracies at which it is aimed on the common law footing - - that is to say, it does not make the doing of any act other than the act of conspiracy a condition of liability. See *Nash, supra* at 378. *Nash,* decided two years later than *Kissel,* is clearly at odds with the Fifth Circuit Court's interpretation of *Kissel.*

In addition, this Court referenced and adopted the decision of *Nash* in *Socony-Vacume, supra* at 252. ("Conspiracy under the Sherman Act are on "the common law footing"; they are not dependant on the "doing of any act after the act of the conspiracy" as a condition of liability). Therefore, in two separate cases, *Nash* and *Socony-Vacume,* this Court held an overt act is <u>not</u> necessary to sustain a conspiracy during the

limitations period, which is diametrically opposite of the holding in *Kissel* and a litany of cases thereafter and, most importantly, is opposite to the holding of the Fifth Circuit Court in this matter.

Remarkably, although the main focus of the Government's Motion for Petition for Rehearing En Banc, the Fifth Circuit fails to even address the holding of *Nash*[7]. The Fifth Circuit's purposeful avoidance of addressing *Nash* through its 15 page analysis is a pointed indication of the difficulty it had in grappling with this issue.

The conflict between the decisions in *Kissel* as to *Nash* and *Socony-Vacume*, is compounded by the fact the Fifth Circuit chooses to interpret one (*Kissel*) and ignore the other (*Nash*). Whether proof of an overt act is necessary to prove a conspiracy continued through the limitations period is a question of law, not fact, and is yet resolved amongst the circuit courts and subject to interpretation as a result of two non-consistent decisions of this Court.

As the Fifth Circuit recognized and acknowledged, their decision squarely conflicts with the Sixth Circuit's decision in *Hayter Oil*. Further, the decision below rests on one "interpretation" of *Kissel* and admittedly states another interpretation is available. Lastly, the decision below ignores the decision in *Nash* which is inconsistent with *Kissel* and in best light verifies another interpretation is available.

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[7] Oddly, the Fifth Circuit did address and discuss the *Nash* holding in its Initial Order but chose to ignore it in the Revised Order even though it was the vehicle upon which the Government sought a Petition for Rehearing En Banc.

In sum, there is conflict amongst the circuit courts and inconsistent rulings from this Court regarding whether it is necessary for the Government to prove an overt act that the conspiracy continued through the limitations period. This issue, as a matter of law, should not be left to interpretation. Rather, this issue warrants this Court's review so to establish uniformity amongst the circuit courts and to provide clarity and guidance to future courts who will undoubtedly face the same or similar issue.

What proof is required and whose burden it is to satisfy something so basic as a statute of limitation should not be subject to multiple interpretations amongst the courts. By accepting Therm-All's Petition for Writ of Certiorari this Court will not only be able to address the Fifth Circuit's opinion below but be able to establish a bright line rule for lower courts to rely upon in issuing decisions on the requisite proof necessary to establish a violation of the Sherman Act within the limitations period.

II. THE FIFTH CIRCUIT'S SUA SPONTE REVERSAL WAS DONE WITHOUT DEFINING "OVERT ACT" AND WAS PREMISED UPON A MISQUOTE THAT WAS THE SOLE PIECE OF EVIDENCE RELIED UPON TO FIND AN "OVERT ACT" DURING THE LIMITATIONS PERIOD.

A. Without Defining "Overt Act" The Circuit Court Reversed Its Initial Order And Improperly Found The Conclusory Testimony Of Wally Rhodes Is An Overt Act.

Although it spent nearly 15 pages of analysis on the issue, the Fifth Circuit never defined "overt act" nor cited to a previous court's definition. This explains why the Fifth Circuit struggled with its decision, but it is unacceptable to rule without defining the very thing you seek to identify.

As stated above, in its Initial Order, the Circuit Court correctly quoted Rhodes testimony ("Until June of 1995") and, more importantly, found the testimony to be "conclusory". (See Initial Order p. 9) (Emphasis added) Again, without explanation or reason, the Court does an about face and finds that the same conclusory testimony, albeit misquoted, is direct evidence of an overt act.[8] (See Revised Order p. 15-16) Such logic is without explanation.

There is no question that the testimony of Rhodes is a mere assertion or conclusion of an ultimate fact without substantiation. Rhodes' statement is no more than a general sweeping statement in answer to when subpoenas were received. Most importantly, common sense and reason hold that a conclusion as to an ultimate fact is not an overt act.

Yet, unwilling or unable to define "overt act", again, the Fifth Circuit stands at odds on this issue with previous courts. Specifically, in *U.S. v. Nippon Paper Industries Co., Ltd.* 62 F.2d 173 at 179, in review of a

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[8] It should be noted that the Government did not even pursue this argument in its briefing to the Circuit Court. (See, Brief of Appellee United States of America, June 6, 2003)

trial court's overruling of a Rule 29 motion[9], found that the mere assertions by these witnesses of the existence of an "ultimate fact" or element, in the most conclusory of terms and with no supporting detail or explanation - - let alone documentation - - is insufficient to satisfy the Government's burden of proof beyond a reasonable doubt on this aspect of its case so as to withstand challenge under Rule 29. Under Rule 29, "the Court can determine whether the inferences that the Government asks the jury to draw are reasonable," and must reject evidentiary interpretations that are "unreasonable, insupportable or overly speculative" (quoting *U.S. v. Spinney*, 65 F.3d 231, 234 (1st Cir. 1995) Conclusory statements, without specific evidence to buttress, cannot be considered overt acts in furtherance of an alleged conspiracy.[10]

Therefore, the Fifth Circuit made two critical mistakes that beckon this Court's review. First, it did not define what is an "overt act" and, more importantly, could not cite to a previous definition for "overt act" is yet defined by any court. This Honorable Court should burden itself with that task so to give guidance to future courts faced with similar circumstances. Second, the Fifth Circuit clearly lost its way by flip flopping and eventually erring by holding conclusory testimony is evidence of an overt act.

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[9] It should be noted that Therm-All's appeal to the Circuit Court was premised upon the trial court's failure to grant its Rule 29 motion. (See, Appellant Therm-All Brief, April 3, 2003)

[10] The functions of the overt act requirement in a conspiracy prosecution is simply to manifest the conspiracy is at work and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence. *Yates v. United States*, 354 U.S. 298 (1957); *Kissel, supra* at 607.

B. The Circuit Court Misquoted The One Sentence Testimony Of Wally Rhodes And Relied Upon The Same To Reverse Itself.

The Circuit Court reversed its Initial Order based upon one, and only one, piece of evidence to find an "overt act" had occurred during the limitations period. All other attempts by the Government to prove that an overt act occurred during the limitations period were rejected by the Court in its Initial and Revised Order; ergo, without the one piece of evidence there is no overt act within the limitations period.

Herein lies the problem, as well as the cause for review, inexplicably the Circuit Court misquoted the very piece of evidence upon which it relies to reverse its Initial Order. This is not merely the opinion or averment of Petitioner as to a material fact. Rather, it is born out by the Circuit Court's conflicting Orders.

To wit, the trial testimony at issue, and what the Circuit Court solely relied upon to find an overt act in its Initial Order, reads as follows:

Q. And how long did your agreement last, Mr. Rhodes?

A. **Until** June of 1995.

Q. What happened in June of 1995?

A. That's when the FBI came in Mizell Brothers with a subpoena from the Justice Department. (Trial transcript at 188) (Emphasis added)

In its Initial Order, the Circuit Court correctly cited this testimony and found it was not proof of an overt act; specifically the Court held: "First, the Government offered conclusory testimony. Rhodes opined that the agreement lasted **until** June 1995; Smith testified that she "guessed" the agreement lasted until subpoenas were issued in June 1995. But neither Rhodes nor Smith testified about any acts occurring after May 31, 1995 to substantiate their opinions. **Neither witness's testimony offers evidence of any overt act within the statute of limitations.**" (See Initial Order p. 9) (Emphasis added)

Inexplicably, and without reason, the Circuit Court, in evaluating the very same testimony under the same rule of law, misquotes the testimony and finds it is proof of an overt act in its Revised Order; specifically, the Court held: The limitations period is five years under 18 U.S.C. §3282, and the grand jury indicted the Defendants on May 31, 2000. Accordingly, the Government was required to produce evidence showing the conspiracy's continued existence after May 31, 1995. The Government did so. Rhodes (of Mizell Co.) testified that the conspiracy continued **through** June 1995. This testimony is direct evidence that the participants were involved in conspiratorial acts, i.e., the acts of setting prices at agreed-upon levels, during the limitations period. The Defendants' limitations argument is thus unfounded. The jury could have reasonably inferred that the conspiracy continued into the limitations period based on this evidence. (See Revised Order p. 15-16) (Emphasis added)

That the Circuit Court misquoted the pivotal piece of evidence it relied upon to reverse itself and find

an overt act occurred during the limitations period is inexcusable for three reasons. First, the Court correctly cited the quote in its Initial Order and found it was not evidence of an overt act. Second, as stated above, the Court acknowledges that this is the only alleged evidence of an overt act in the limitations period. Third, and finally, the testimony is not one subject to interpretation. "Until" and "through" are distinct in their meaning and their meaning is not open to inference or interpretation.

"Until" is defined as "up to the time of" or "before a specific time". (Webster's II, New College Dictionary, at 1211, 1995) "Through", on the other hand, is defined as "from one end or side to another or opposite end or side" or "from beginning to end". (*Id.* at 1150) The difference between "until" and "through" is as clear as night and day.

The instant matter warrants review for the Circuit Court made two fatal errors in reversing its Initial Order. First, it misquoted the very evidence it relied upon to find an overt act existed during the limitations period. Second, compounding the error, the Circuit Court found the misquoted, conclusory testimony of Rhodes to be an overt act which is clearly in conflict with the discussions of *Nippon Paper* and *Spinney*.

Further, and a corollary to the Court's second error, what is an "overt act" is yet defined by this Honorable Court. As such, it is of great importance for this Honorable Court to define what is an overt act for purposes of satisfying the statute of limitations under the Sherman Act so to insure that future courts are not

left with the same ambiguity upon which the Fifth Circuit Court lost its way.

III. CONCLUSION.

Therm-All's Petition for Writ Certiorari should be granted for three particular reasons. First, there is a conflict amongst the circuit courts, as well as non-consistent rulings from this Court, regarding the issue of whether it is necessary for the Government to prove an "overt act" during the statute of limitations period to sustain a conviction under the Sherman Act. The Fifth Circuit, in its decision on the case at bar, openly admitted, acknowledged and recognized such a conflict exists; as such, it is incumbent upon this Court to resolve this issue, with clarity, so to avoid future courts facing the same dilemma.

Second, and a direct corollary to the first, this is a matter of great importance for in its, and as a part of, quandary on this issue the Fifth Circuit failed to define, nor did it cite to a prior definition, what is an "overt act". Therefore, not only does a conflict lie amongst the circuit courts as to whether it is necessary to prove an "overt act" during the limitations period, the circuit courts are also without understanding or guidance to what is an "overt act". Said void, and why it is of great importance, is evidenced by the Fifth Circuit's decision being at odds with *Nippon Paper*, *supra* and *Spinney*, *supra*.

Lastly, the Fifth Circuit misquoted the very piece of evidence it relied upon to find an "overt act". This misquote is not subject to interpretation or argument for the Fifth Circuit properly quoted the

same evidence in its Initial Order finding it not to be evidence of an "overt act". Thus, where normally such an error would not be meritorious of this Court's review, it is in the instant matter for, as the Fifth Circuit reasoned, it is the only piece of evidence that an "overt act" occurred within the limitations period. Such an obvious and unquestioned error, upon which the entire decision rests, must be reviewed by this Court, in conjunction with its review of what is an overt act, to avoid a grave miscarriage of justice.

Respectfully submitted,
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20843

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THERM-ALL, INC., and
SUPREME INSULATION, INC.,
Defendants-Appellants.

Appeals from the United States District Court
For the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion December 3, 2003, 5th Cir. 2003, ____F.3d____)

Before REAVLEY, JONES, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge.

Upon reconsideration, we withdraw our previous opinion, reported at 352 F.3d 924, and substitute the following.[1]

After a seven-week trial, a jury convicted Therm-All, Inc. ("Therm-All") and Supreme Insulation, Inc. ("Supreme") of conspiring to fix prices in the building insulation industry, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Therm-All and Supreme (collectively "Defendants") raise the following six issues on appeal: (1) whether sufficient evidence supports the jury finding that a conspiracy existed; (2) whether the Government produced evidence that the conspiracy existed during the statute of limitations period; (3) whether a fatal variance existed between the indictment and the proof at trial; (4) whether the district court improperly instructed the jury; (5) whether the district court should have ordered a new trial based on prosecutorial misconduct; and (6) whether a discovery error by the Government rises to the level of plain error. We conclude that the Defendants do not prevail on any of these issues, so we affirm the judgment.

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[1] No member of the panel nor judge in regular active service of the Court having requested that the Court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is denied.

I. FACTS AND PROCEEDINGS

During the 1990's, five companies, Therm-All, Supreme, Bay Insulation Supply Company ("Bay Insulation"), Mizell Brothers Company ("Mizell Co."), and CGI Silvercote ("CGI"), dominated the market for laminated fiberglass. These companies laminated fiberglass so that it could be used to insulate metal buildings. In 1992 and 1993, the metal-building industry expanded dramatically, and consequently, prices of metal-building insulation plummeted. In late 1993, the fiberglass manufacturers—suppliers for the five fiberglass laminating companies listed above—announced a price increase and an "allocation" system under which they would be producing more residential and less metal building insulation.

At trial, the Government presented evidence that during the fiberglass manufacturer's allocation period, the five laminating companies acted in the following manner to bring about a conspiratorial agreement. In October 1993, during a convention in Dallas, Texas, the laminating companies discussed forming a committee to establish product and safety standards for metal building insulation. Subsequently, the president of Therm-All, Robert Smigel ("Smigel"), telephoned the national sales manager for Mizell Co., Wally Rhodes ("Rhodes"), to discuss whether Mizell Co. had any interest in supporting this committee. Near the end of their conversation, Smigel (of Therm-All) mentioned the prevailing low prices in the industry, and characterized the situation as "a dog-eat-dog market." Smigel said he thought Bay Insulation, which was expanding into many new areas at the time, was responsible for the low prices, and Rhodes (of Mizell Co.) agreed. Smigel then said that he had agreed with the sales manager of Bay Insulation, Mark Maloof ("Maloof"), to increase and maintain prices. This

would be accomplished, Smigel explained, by publishing price sheets with nearly identical prices, and "selling . . . on the price sheet, not coming below the price sheet and not jumping the brackets." Rhodes "immediately" agreed that Mizell Co. would do the same. In January 1994, Rhodes had similar conversations with Maloof (of Bay Insulation) and with the president of Supreme, Tula Thompson ("Thompson"), in which they agreed to raise prices, use bracket pricing, and not deviate from the price sheets. Thus, by January 1994, Smigel, Thompson, Maloof, and Rhodes had reached an agreement "to get the pricing up in the industry and make more money." Smigel then brought CGI into the conspiracy, as well as smaller regional competitors.[2]

The conspirators faxed each other price sheets, and spoke on the phone "to get the pricing in line with each other . . . within a couple of dollars of each other in each [pricing] bracket," trying not to use the "exact" same prices so that customers would not get suspicious. For example, Rhodes (of Mizell Co.) received a copy of Therm-All's February 14, 1994 price sheet from Smigel's Therm-All office in January 1994, at which time Rhodes was working on Mizell Co.'s prices. Rhodes then "tried [his]

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[2] Witness Peter Yueh provided evidence of a smaller regional competitor joining the conspiracy. Yueh was a former vice president of a company that sold laminated fiberglass primarily in Texas; he testified that his former company became part of the conspiracy in January 1994.

best to get the numbers as close as [he] could . . . to [Therm-All's] numbers without being identical in every bracket." When he finished, Rhodes faxed Mizell Co.'s draft price sheet to Smigel a few days before it became effective.

Another example of conspiratorial conduct allegedly occurred when Rhodes (of Mizell Co.) told Leif Nilson, Mizell Co.'s California plant manager, that he had an agreement with Thompson (of Supreme) to keep the California prices up, and therefore, they were to stick to the price sheets. On one occasion, Rhodes faxed Nilsen "Supreme's price sheet" containing a Supreme fax header.

Several witnesses explained how the various companies policed and enforced the agreement. Rhodes (of Mizell Co.) testified that when a conspirator believed another conspirator was offering too low a price to a mutual customer, the conspirator could call Rhodes and verify the complaint or obtain an explanation. Rhodes provided an example of this conduct, stating that Smigel (of Therm-All) called him several times in 1994 complaining that a Mizell Co. salesperson in Pennsylvania had jumped a bracket. Nilsen (of Mizell Co.) also called Rhodes whenever he believed that Supreme was pricing below the agreed-upon level. Rhodes responded to Nilsen that he would "call and see what was going on," and then called back to say that he had discussed the incident with Supreme and that it would not happen again.

Evidence also existed that Supreme called co-conspirators when it suspected they were not complying with the agreement. Supreme's California salesman, Jim Miranda ("Miranda"), told his plant manager that, according to a customer, Supreme's quote to that customer was higher than Mizell Co.'s quote. The plant manager relayed this information to Thompson (of Supreme), who called Rhodes (of Mizell Co.), who told

Thompson that the customer must have been "pulling [Miranda's] leg."

The following evidence is also noteworthy for purposes of this appeal. First, Miranda provided testimony at trial (1) that Thompson (of Supreme) obtained a price sheet from Rhodes (of Mizell Co.), and (2) that Miranda (of Supreme) himself had told this information to the grand jury. Second, Rhodes (of Mizell Co.) testified that the conspiracy continued through June 1995. Third, Mark Engebretson ("Engebretson"), a Therm-All employee, testified that he had conversations with Roger Ferry ("Ferry"), a CGI employee, about pricing information. The telephone records of Engebretson (of Therm-All) revealed that on June 8, 1995, he had a short conversation with Ferry (of CGI), and sent Ferry a fax on June 15, 1995. Fourth, Rhodes (of Mizell Co.) testified that a price sheet that CGI had in its possession contained the handwriting of a Therm-All vice president, Dennis Kaczmarek ("Kaczmarek"), on it.

The jury acquitted Smigel (of Therm-All) and Thompson (of Supreme), but found Therm-All and Supreme guilty. Therm-All and Supreme filed motions for judgment of acquittal and new trial, but the district court denied those motions. Thermal-All and Supreme timely appeal.

II. STANDARD OF REVIEW

This Court reviews de novo the denial of an appellant's motion for acquittal. *United States v. Medina*, 161 F.3d 867, 872 (5th Cir. 2002). A motion for a judgment of acquittal challenges the sufficiency of the evidence to convict. *See* FED. R. CRIM. P. 29(a). In ruling on the motion for acquittal, this Court reviews the evidence, all reasonable inferences drawn from it, and all credibility determinations in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80

(1942); *Medina*, 161 F.3d at 872.

This Court reviews the denial of a motion for new trial for abuse of discretion. *Miss. Chem. Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 365 (5th Cir. 2002). This Court will uphold a jury verdict if "a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996).

III. DISCUSSION

Defendants raise six issues on appeal. The first is whether the Government produced sufficient evidence to show that a conspiracy existed. The second is whether evidence exists that the alleged conspiracy continued during the limitations period. The third is whether a fatal variance exists between the indictment and the proof at trial. The fourth is whether the district court improperly instructed the jury. The fifth is whether the district court should have ordered a new trial based on the Government's closing argument. The sixth is whether a discovery error by the Government rises to the level of plain error. We address each in turn.

A. Sufficiency of the evidence

Defendants first argue that the evidence does not support the jury verdicts against them because the jury did not convict Thompson (of Supreme), Rhodes (of Mizell Co.), or Smigel (of Therm-All) of illegal activity. This argument fails. In *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676, 684-85 (5th Cir. 1981), this Court faced the same issue. There, the Government alleged that several companies and their agents violated Section 1 of the Sherman Act. *Id.* The jury convicted the companies but acquitted their agents. *Id.* at 684-85. On appeal, the companies argued that the evidence did not support their convictions because every person who could

have acted as their agent had been acquitted. *Id.* This Court rejected that argument, stating:

In this Circuit consistency is not required. That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters. As the Supreme Court explained in a similar case in which the corporation was acquitted and the individual was convicted, "whether the jury's verdict was a result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries." *United States v. Dotterweich*, 320 U.S. 277, 279 (1943).

Id. at 685 (internal citations and quotations omitted). Thus, because a consistency of verdicts is not necessary to convict a corporation, the Defendants' argument fails.

Defendants next contend that they could not have been guilty of conspiring to fix prices because circumstantial evidence demonstrates otherwise. Specifically, Therm-All cites evidence that its price increases were correlated with the fiberglass manufacturers' allocation period; Supreme cites evidence that it increased sales during that period and took customers away from Mizell Co. and Bay Insulation. This evidence, however, does not compel the conclusion that Therm-All and Supreme could not have engaged in price-fixing activity. The jury could reasonably infer that despite market conditions affecting the price, and despite competitive activity, the companies conspired to raise the aggregate prices of their goods. Indeed, direct testimony supports such an inference.[3]

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[3] For this same reason, we also reject Supreme's brief argument that

The Defendants' circumstantial evidence thus falls well short of establishing that the jury verdict was an unreasonable one.

B. Statute of limitations

The Defendants argue that the Government failed to produce any evidence that the conspiracy occurred within the applicable statute of limitations period. The Government counters this argument by contending that antitrust law does not require that it produce any evidence of the conspiracy's continued existence during the limitations period because Defendants failed to make a showing of abandonment. For the reasons discussed below, we hold that in a price-fixing conspiracy, the government must produce evidence of the conspiracy's continued existence during the limitations period. We further hold that in this instance, the Government has satisfied that burden.

(1) Whether the Government was required to prove the conspiracy's existence in the limitations period

The question of whether the government must produce evidence that a price-fixing conspiracy continued to exist during the limitations period is *res nova* for this Court. The issue arises in part from a statement made in a historic antitrust case, *United States v. Kissel*, 218 U.S. 601 (1910). In *Kissel*, the Supreme Court addressed whether the government must prove that a defendant has acted in the limitations period to show that an antitrust conspiracy occurred during that time. 218 U.S. at 601. To answer this question, the Court first discussed the issue of whether a conspiracy was a continuing crime. *Id.* at 607 ("[W]e first will consider whether a conspiracy can have continuance in time."). The defendants asserted that

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the verdict is against the great weight of the evidence.

the conspiracy was a completed crime once the participants had formed the agreement—not a continuing crime. *Id.* Based on that assertion, the defendants further argued that despite subsequent acts in furtherance of the agreement (which by themselves were not actionable), the statute of limitations should run from the time of the original agreement. *Id.* The Court rejected this argument, holding that the antitrust conspiracy was indeed a continuing crime. *Id.* at 607-08. The Court reasoned that "if [the defendants] do continue such efforts in the pursuance of the plan, the conspiracy continues up to the time of abandonment or success." *Id.* at 608. This statement, then, was the basis for the Court rejecting the defendants' argument that the subsequent acts were not part of the original act of conspiracy.

The above statement can be interpreted two ways. The first interpretation posits that the conspiracy is presumed to continue indefinitely, whereas the second posits that the conspiracy is presumed to continue up to the point of the last act in furtherance of the conspiracy. Under the first interpretation, once a conspirator has committed an act of continuing effort, the conspiracy would continue indefinitely unless the conspirator made a showing of abandonment or success. The indefinite presumed existence would imply that the conspiracy is indefinitely actionable. The limitations period would always be tolled absent a showing of abandonment or success.

Under the second interpretation, once a conspirator has committed an act of continuing effort, the conspiracy would continue from the point of the original conspiratorial agreement until the last act of continuing effort. That presumption of its continued existence between those two points in time would only be rebutted if the conspirator had made a showing of abandonment or

success. In effect, the statute of limitations would reset from that act of continuing effort. The indictment would therefore have to be brought within the applicable limitations period after that act of continuing effort. That is, the government would have to show that the conspirator committed an act of continuing effort within a time period before the date that the indictment was brought.

The facts and reasoning of *Kissel* compel the second interpretation. As previously noted, the Supreme Court stated that a "conspiracy continues up to the time of abandonment or success" in the context of rejecting the defendants claim that an act of continuing effort should not be part of the same actionable conduct as the original conspiratorial agreement. *Kissel*, 218 U.S. at 608. The Court held that the limitations period did not expire from the original conspiratorial act because—as stated in the cited sentence—a presumption exists that the conspiracy continues between the original conspiratorial act and the act of continuing effort (absent a showing of abandonment or success). *Id.* In so holding, the Court relied upon the fact that "[t]he overt acts relied upon [occurred] within three years of the indictment [and were] alleged to have been done in pursuance of the conspiracy . . . ." *Kissel*, 218 U.S. at 609-10. The Court therefore reasoned that because the overt acts (1) occurred within three years of the indictment (the limitations period), and (2) denoted efforts to carry out the conspiracy, the original antitrust conspiracy continued into that period.[4] *Id.* *Kissel* thus implies that if conspirators commit overt acts in

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[4] Notably, the Court did not rely on the fact that the conspirators had failed to show abandonment or success in concluding that the conspiracy continued to exist.

furtherance of a conspiracy, the statute of limitations period resets from the commission of those acts. The statute of limitations runs from the last overt act.[5] Stated another way, an overt act must occur within a certain time period—as defined in the statute of limitations—prior to the date on which the indictment is brought.

The Supreme Court further clarified this principle in the civil context of a continuing antitrust conspiracy in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).[6] The Court stated:

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[5] A leading antitrust treatise supports this understanding of the statute of limitations as it relates to an antitrust conspiracy. 2 HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 208 (2d ed. 2000). In explaining continuing antitrust conspiracies, the treatise states that "[t]he idea of the continuing conspiracy or violation is that the defendant continues to commit acts in furtherance of the violation and each of these additional acts causes additional injury. The statute is said to be tolled as long as such qualifying acts continue to be committed." *Id.*

[6] Although *Zenith* was a civil suit, the stated principle should

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . In the context of a continuing conspiracy to violate the antitrust laws, . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants . . . the statute of limitations runs from the commission of the act.

Id. at 338. Thus, the statute of limitations runs from the commission of each act that is subsequent to the original conspiracy act. *Id.* The party bringing the antitrust action must therefore show that the conspiracy continued into the limitations period.

a. Relevant Fifth Circuit precedent

This Court has addressed whether a continuing antitrust conspiracy extends into the statute of limitations period in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975), and again in *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271 (5th Cir. 1991). While these cases arose in the civil context, this fact does not distinguish the burden-of-proof principle because civil proceedings require a less stringent burden of proof than criminal. In *Poster Exchange*, this Court considered whether an antitrust conspiracy continued into the limitations period where

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also be true in the criminal context because criminal proceedings require a higher burden of proof than civil proceedings.

the defendants, before the limitations period began, allegedly agreed not to sell items to the plaintiff. 517 F.2d at 117. This Court held that to invoke the continuing-conspiracy doctrine, the plaintiffs had to show that "there had been a specific act or word of refusal [by defendants to do business with plaintiff] during the limitations period." *Id.* at 129. Because the summary-judgment record did not make clear that the defendants had committed an act during the limitations period, this Court remanded for further findings. *Id.* at 128-29.

In *Al George*, this Court again considered whether a plaintiff had to show an act within the limitations period to allege an antitrust violation. 939 F.2d at 1273-74. This Court recognized that "'a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, *not merely the abatable but unabated inertial consequences of some pre-limitations action.*'" 939 F.2d at 1274 (quoting *Poster Exchange*) (emphasis in *Al George*). Because the plaintiff failed to allege an overt act within the statute of limitations time period, this Court held that the limitations period had run. *Id.* at 1275.

b. Ninth Circuit persuasive authority

In *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991), the Ninth Circuit faced the same question as this Court does in the instant case. There, the court considered whether a district court provided a correct jury instruction in a criminal price-fixing conspiracy case. *Id.* at 1048. The court held that the district court "correctly stated" the law when the district court instructed the jury both that (1) the government did not need to show an overt act in furtherance of a price-fixing conspiracy, and (2) the government must show an overt act in order to establish that the price-fixing conspiracy existed within the limitations period. *Id.* Thus, the

Brown decision recognizes that even though the government need not show an overt act in furtherance of a price-fixing conspiracy, the government was still required to show *some* act within the limitations period.

Additional Ninth Circuit precedent further supports the above interpretation of *Kissel*. In *United States v. Inryco, Inc.*, 642 F.2d 290 (9th Cir. 1981), the court interpreted *Kissel* as standing for the following statement of law:

> While a Sherman Act conspiracy is technically ripe when the agreement to restrain competition is formed, it remains actionable until its purpose has been achieved or abandoned, and *the statute of limitations does not run so long as the co-conspirators engage in overt acts* designed to accomplish its objectives. *U. S. v. Kissel*, 218 U.S. 601, 607-608 (1910).

Id. at 293 (emphasis added). This passage sets forth the rule of law that the statute of limitations is tolled only if a conspirator engages in overt acts. While the passage also presumes that a conspiracy continues to exist until its purpose has been achieved or abandoned, this statement cannot be construed to mean that this presumed continued existence automatically tolls the statute of limitations. Were the statement read as such, it would render the passage's explicit condition for tolling meaningless. In order for the presumption to continue, there must be an overt act. Absent an overt act, the presumption that a conspiracy remains actionable must end after the limitations period has run from the time of the last overt act. Thus, the passage means that the statute of limitations is tolled only if a conspirator commits an overt act.

c. Conflicting authority

Despite the apparent clarity of the rule that the government must produce evidence that a price-fixing conspiracy exists during the limitations period, the language of a Sixth Circuit opinion can be construed as holding otherwise.[7] In *United States v. Hayter Oil Co. Inc. of Greenville, Tennessee*, 51 F.3d 1265 (6th Cir. 1995),

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[7] The Government argues that the rationale of a recent Second Circuit opinion, *United States v. Spero*, 331 F.3d 57 (2d Cir. 2003), should control here. We disagree. In *Spero*, the Second Circuit held that a RICO conspiracy would continue, even into the limitations period, until the defendants made an affirmative showing that they had withdrawn. *United States v. Spero*, 331 F.3d at 60-61. As a preliminary matter, this case is two steps removed from the instant case. First, this case occurs in the Second Circuit—not the Fifth. Second, this case arises in the RICO context—not antitrust. The Second Circuit has not actually applied the cited rationale in the context of a price-fixing agreement. For these two reasons, alone, *Spero* is not persuasive. More importantly, the rationale of *Spero* appears to conflict with *Kissel*, and expressly conflicts with *Al George*, *Poster Exchange*, *Brown*, and *Inryco*.

Even if precedent did not speak to this issue, *Spero* is not persuasive. "Limitations serve the same functions in anti-trust as elsewhere in the law: to put old liabilities to rest, to relieve courts and parties from 'stale' claims where the best evidence may no longer be available, and to create incentives for those who believe themselves wronged to investigate and bring their claims promptly . . . ." 2 HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 205 (2d ed. 2000). Adopting the Second Circuit's rule would circumvent the policy underlying the law of limitations. The rule of *Spero* allows the government to bring claims well after any evidence is found to substantiate the original act of conspiracy. It nullifies much of the incentive to bring a claim after the last alleged injurious act because the statute of limitations would only begin running from the time that the defendant made a showing of abandonment. We therefore decline to adopt the Second Circuit's rationale in the context of a price-fixing conspiracy.

the Sixth Circuit faced an issue similar to that posed in the instant case. The court explained the limitations law governing price fixing as follows:

Because the price-fixing agreement itself constitutes the crime, the government is only required to prove that the agreement existed during the statute of limitations period and that the defendant knowingly entered into that agreement. Proof of an overt act taken in furtherance of the conspiracy within the statute of limitations period would clearly demonstrate the continued existence of the conspiracy. *However, once a conspiracy has been established, it is presumed to continue until there is an affirmative showing that it has been abandoned.*

51 F.3d at 1270-71 (citation omitted) (emphasis added). The last sentence of this quotation implies that once a conspiracy has been established, even outside the limitations period, that conspiracy is presumed to continue indefinitely until it has been abandoned. The facts of the case, however, suggest that the court did not rely on this statement of law to show that the agreement continued into the limitations period. The facts consisted of defendants committing multiple acts in furtherance of the price-fixing conspiracy both outside of and within the limitations period. *Id.* at 1271. Specifically, undisputed evidence demonstrated that prior to the limitations period a conspiracy existed; evidence also existed that during the limitations period, the conspirators set prices at an agreed-upon level and made telephone calls discussing prices. *Id.* Based on these alleged events, the court concluded that "[t]here is . . . sufficient evidence in the record that the conspiracy continued past the relevant statute of limitations date." *Id.* Accordingly, the court did not rely solely on the proposition that there is a presumption of a continued conspiracy in holding that the

defendants had continued their price-fixing conspiracy during the limitations period. *Id* at 1270-71. The facts and reasoning of *Hayter Oil* do not warrant construing the single cited sentence to be a sufficient reason to presume the continued existence of the conspiracy within the limitations period.

The single sentence in *Hayter Oil* also seems to conflict with the Sixth Circuit's general requirement that the government "is . . . required to *prove* that the agreement existed during the statute of limitations period." 51 F.3d at 1270 (emphasis added). If the cited sentence were to mean that the presumption continues even into the limitations period—regardless of whether the government shows any act during that period—the court would have nullified its prior statement that the government is "required to prove" that the conspiracy existed during that time. Thus, to preserve the meaning of the court's statement regarding the government's burden of proof, it seems necessary to construe the cited sentence regarding the presumption of continued existence as mere support for the court's prior statement that *any* overt act demonstrates the conspiracy's continued existence. In effect, the Sixth Circuit seems to treat the identified presumption as a justification for allowing an overt act—which might otherwise be insufficient to convict for conspiracy—to be sufficient to show that the conspiracy occurred within the limitations period. This reading preserves the meaning of both the statement imposing a burden of proof on the government, and the statement concerning the conspiracy's continued existence. In any event, the *Hayter Oil* court did not rely only on this single sentence to hold that the Government satisfied its burden of proof to show that the conspiracy continued into the limitations period. It would therefore be inappropriate to conclude that the cited presumption

satisfies the government's burden "to prove that the agreement existed during the statute of limitations period." *See id.*

Thus, although the Sixth Circuit has possibly espoused a view that appears to mean that a price-fixing conspiracy is presumed to continue into the limitations period, its statement is not persuasive for this Court to presume the conspiracy's continued existence absent any evidence of such. Supreme Court precedent, this Court's precedent, and persuasive authority of the Ninth Circuit lead us to conclude that the government must produce evidence that the conspiracy continued during that time.

(2) Whether the Government did produce evidence in the limitations period

Defendants argue that the Government failed to produce evidence demonstrating that the price-fixing conspiracy existed within the limitations period. The argument fails. The limitations period is five years under 18 U.S.C. § 3282, and the grand jury indicted the Defendants on May 31, 2000. Accordingly, the Government was required to produce evidence showing the conspiracy's continued existence after May 31, 1995. The Government did so. Rhodes (of Mizell Co.) testified that the conspiracy continued through June 1995. This testimony is direct evidence that the participants were involved in conspiratorial acts, i.e., the acts of setting prices at agreed-upon levels, during the limitations period. The Defendants' limitations argument is thus unfounded. The jury could have reasonably inferred that the conspiracy continued into the limitations period based on this evidence.

C. The indictment and the proof at trial

Therm-All argues that a fatal variance exists between the indictment, which alleged a single, nationwide conspiracy, and the proof at trial, which

Therm-All claims only established multiple conspiracies.[8] To prevail on this claim, Therm-All must prove "(1) a variance between the indictment and the proof at trial, and (2) that the variance affected the defendant's substantial rights." *United States v. Herrera*, 289 F.3d 311, 318 (5th Cir. 2002). As discussed below, Therm-All fails to prove either point.

(1) Alleged variance between the indictment and the proof at trial

No fatal variance appears between the indictment and the evidence. The indictment alleges a single, nationwide conspiracy, and the evidence appears to support that allegation. When counting conspiracies, "this Court will consider (1) the existence of a common goal, (2) the nature of the scheme, and (3) overlapping of participants in the various dealings." *United States v. Morgan*, 117 F.3d 849, 858 (5th Cir. 1997). "A jury's finding that the government proved a single conspiracy must be affirmed unless the evidence, viewed in the light most favorable to the government, would preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt." *Id.*

"This [C]ourt has defined the 'common goal' factor used to count conspiracies broadly." *Morgan*, 117 F.3d at 858; *accord United States v. Morris*, 46 F.3d 410, 415 (5th Cir. 1995) (observing that the Fifth Circuit has broadly defined this criterion and has adopted an expansive notion of "common purpose"). In *Morris*, this Court held that the common goal of a single conspiracy was to "to

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[8] Supreme does not appeal this point of error.

profit from the illicit purchase and selling of cocaine." 46 F.3d at 415. Similarly, the activity at issue here stems from a common goal of deriving illicit profits from the sale of common goods. Direct testimony of Rhodes (of Mizell Co.) and Smigel (of Therm-All) supports the inference that the Defendants had a common goal of raising and maintaining prices.

The nature of the scheme also points to the conclusion that the evidence supports an inference of a single, nationwide conspiracy. This Court has defined the nature-of-the-scheme criterion to mean that "if an agreement contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, then such agreement constitutes a single conspiracy." *Morris*, 46 F.3d at 415-16 (quoting *United States v. Perez*, 489 F.2d 51, 62 (5th Cir. 1973)). "The existence of a single conspiracy will be inferred where the activities of one aspect of the scheme are *necessary or advantageous* to the success of another aspect or to the overall success of the venture, where there are several parts inherent in a larger common plan." *Id.* at 416 (emphasis added). Here, evidence exists that prior to the alleged conspiracy, Bay Insulation aggressively priced its goods at a low level that sent the market into a price war. Smigel (of Therm-All), who only did business in the north, complained that Bay Insulation's low prices resulted in a "dog-eat-dog market." Evidence thus suggests that without the continuous cooperation of all conspirators involved, the price-fixing conspiracy would have collapsed. It appears advantageous, and ultimately necessary, for all alleged conspirators to have engaged in fixing prices if the alleged conspiracy were successful.

The third consideration—whether participants in the various dealings overlap—also supports an inference

of a single conspiracy. In *United States v. Richerson*, 833 F.2d 1147, 1154 (5th Cir. 1987), this Court opined that "[p]arties who knowingly participate with core conspirators to achieve a common goal may be members of an overall conspiracy." This Court further explained:

> A single conspiracy exists where a "key man" is involved in and directs illegal activities, while various combinations of other participants exert individual efforts toward a common goal. . . . The members of a conspiracy which functions through a division of labor need not have an awareness of the existence of the other members, or be privy to the details of each aspect of the conspiracy.

Id. (internal citation omitted); *accord Morris*, 46 F.3d at 416-17. Here, evidence exists that Rhodes (of Mizell Co.) was a key actor in the alleged illegal price fixing, policing and contacting all other conspirators, including Therm-All. Thus, the jury could have inferred that Rhodes acted as a "core conspirator" to achieve the common goal of fixing prices for all participants.

Because evidence supports the existence of (1) a common goal, (2) the necessity of continuous cooperation among the conspirators for the conspiracy's success, and (3) the presence of a key actor coordinating the efforts of the conspirators, we conclude that no fatal variance arises between the indictment and the proof at trial.

(2) Therm-All's substantial rights

Assuming *arguendo* that a variance did exist between the indictment and the proof at trial, Therm-All fails to show that it was prejudiced. "When the indictment alleges the conspiracy count as a single conspiracy, but the government proves multiple

conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights." *United States v. Morrow*, 177 F.3d 272, 291 (5th Cir. 1999) (internal quotations omitted). As discussed above, the evidence was sufficient to support the jury finding that Therm-All was involved in the conspiracy.

D. Jury instruction

Defendants argue that the district court improperly instructed the jury in two ways: (1) by failing to include a jury instruction on competitive pricing; and (2) by failing to include intent as an element of the antitrust violation. Their argument fails. "We recognize that[] when a defendant properly requests an instruction on a theory of defense that is supported by some evidence, it is reversible error not to adequately present the theory." *United States v. All Star Industries*, 962 F.2d 465, 473 (5th Cir. 1992). Nevertheless, "[w]hen a charge is challenged on appeal, we evaluate it in its entirety, looking to see whether the charge as a whole was correct." *United States v. Hagmann*, 950 F.2d 175, 180 (5th Cir.1992); *accord All Star*, 962 F.2d at 473.

With respect to the Defendants' first point of error, the district court instructed the jury as follows:

> Mere similarity of prices charged does not, without more, establish the existence of a conspiracy . . . . Nor is it illegal to . . . exchange pricing information without more.
>
> . . .
>
> A person or company may lawfully charge prices identical to those charged by competitors and may even copy the price lists of a competitor or follow and conform exactly to the price policies and charges of a competitor as long as the person or

> company does not do so pursuant to a price-fixing agreement or mutual understanding with a competitor.
>
> . . .
>
> Conduct that is as consistent with permissible competition or independent action as with illegal collusion, standing alone, is not sufficient to prove that the Defendant joined the conspiracy.
>
> . . .
>
> You should consider all of the evidence, giving it the weight and credibility you think it deserves, when determining whether similarity of pricing resulted from independent acts of businesses competing freely in the open market or whether it resulted from a mutual agreement or understanding between two or more conspirators.

These jury instructions demonstrate that the district court instructed the jury as to how evidence of competitive pricing could be favorable to the Defendants. The first part of Defendants' argument is therefore without merit.

Defendants' second assignment of error with respect to the jury charge is that the district court failed to include intent as an element of the antitrust violation. For this proposition, they rely on *United States v. Gypsum*, 438 U.S. 422, 430 (1978). In *Gypsum*, the Government produced circumstantial evidence of a price-fixing conspiracy in the form of information exchanges between the companies about prices. *Id.* The district court instructed the jury that it could presume the element of intent if the effect of the information exchanges was to raise, fix, maintain, and stabilize prices. *Id.* On appeal, the Supreme Court reversed the defendants' convictions, stating that intent is an "element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom . . . ." *Id.* at 435.

This Court interpreted the *Gypsum* holding in

United States v. Cargo Service Stations, Inc., 657 F.2d 676 (5th Cir. 1981). In so doing, this Court opined that convictions in a price-fixing case "would be valid even if they rested solely on circumstantial evidence so long as the jury was required . . . to find that defendants knowingly engaged in a conspiracy to fix prices." *Cargo Service*, 657 F.2d at 683 n.5. In the instant case, the district court instructed the jury as follows: "[T]he Government has to prove beyond reasonable doubt that the Defendant knowingly agreed with a competitor to raise, fix and maintain prices, and that the Defendant actually intended to carry out the agreement in fact." According to *Cargo Service*, the district court's jury instruction was completely valid. Defendants' argument fails.

E. Alleged prosecutorial misconduct

Defendants contend that the district court erred in denying their motion for new trial because the Government allegedly argued facts to the jury for which there was no supporting evidence. When considering whether a prosecutor's remarks cast doubt on a jury's verdict, this Court examines "(1) the magnitude of the statement's prejudice, (2) the effect of any cautionary instructions given, and (3) the strength of the evidence of the defendant's guilt." *Morrow*, 177 F.3d at 298 (quoting *United States v. Tomblin*, 46 F.3d 1369, 1389 (5th Cir.1995)). "A defendant must show that the prosecutor's statements affected his substantial rights." *Morrow*, 177 F.3d at 298.

(1) Therm-All's argument

Therm-All argues that the prosecutor incorrectly characterized an evidentiary document from the price book of Rhodes (of Mizell Co.) as a "draft Therm-All price sheet." Yet Smigel (of Therm-All) admitted that the document was a draft price sheet. Furthermore, the

district court immediately instructed the jury that the prosecutor's statement was only "argument by counsel," and that if this argument "should differ from your views, you follow your own views of the evidence." The statement does not appear to have created prejudice.

Therm-All next contends that the prosecutor improperly stated that Kaczmarek (of Therm-All) "handed off" a price sheet to a CGI representative. In fact, however, the prosecutor stated that Kaczmarek had denied providing CGI a price sheet, and then the prosecutor rhetorically asked if that denial "made sense" in view of the fact that Smigel (of Therm-All) and Kaczmarek had worked closely together. The prosecutor never actually stated that Kaczmarek provided CGI with a price sheet. Moreover, even if the prosecutor had made such a statement, evidence supports that assertion. CGI produced the disputed document, indicating that it was in CGI's possession, and Smigel had testified that the document bore the handwriting of Kaczmarek.

Therm-All lastly contends that evidence does not support the prosecutor's argument that Engebretson (of Therm-All) sent Ferry (of CGI) a price sheet. We first note that Therm-All never objected to the prosecutor's statement before the district court, so we review the disputed statement for plain error. *See United States v. Munoz*, 150 F.3d 401, 415 (5th Cir. 1998). With respect to the evidence, Engebretson testified that he had conversations with Ferry, and specifically remembered that they had spoken about pricing. Engebretson's telephone records reveal that on June 8, 1995, he had a short conversation with Ferry, and sent Ferry a fax on June 15, 1995. Based on that evidence, the prosecutor argued that Engebretson was talking to Ferry about pricing, and that he was "sending [Ferry] a price sheet—exchanging pricing." The prosecutor also argued

that Engretson was faxing "stuff" to Ferry through June 15, 1995, and was talking to Ferry about prices.

Therm-All complains that these two comments are completely unsupported by the evidence. This contention is unavailing. Even though no direct evidence may have existed that Engebretson (of Therm-All) faxed a price sheet to Ferry (of CGI), the magnitude of the alleged prejudice appears minimal given that evidence did exist that Engebretson conversed with Ferry about pricing, and faxed documents to Ferry. Indeed, Engebretson's testimony substantially supports the Defendants' guilt even without the assertion that he faxed a price sheet to Ferry. We thus conclude that the prosecutor's suggestion that Engebretson faxed Ferry a price sheet does not constitute plain error.

(2) Supreme's Argument

Supreme argues that the prosecutor improperly referred to the grand jury testimony of Supreme employee, Miranda. While it is true that the government may not bolster a witness's credibility with prior grand jury testimony that is not in the record, *see United States v. Murrah*, 888 F.2d 24, 26 (5th Cir. 1989), this sort of violation is not present here. Miranda testified at trial that the answer he was providing was the same as his testimony to the grand jury. Thus, the record supported the prosecutor's argument that the grand jury testimony supported the credibility of Miranda's statement. Moreover, the district court stated the following limiting instruction after Supreme objected to the prosecutor's statement: "There is no evidence from the grand jury before us . . . . But, even if there is any grand jury [testimony] . . . , it is not introduced for the truth. You may not rely on grand jury testimony, period, for anything except . . . credibility of a witness . . . ." Given the content of the record, and the limiting instruction of

the district court, denying the motion for new trial was not an abuse of discretion.

Supreme also argues that the prosecutor improperly referred to the plea agreement of Rhodes (of Mizell Co.) as evidence of a nationwide price-fixing conspiracy. This argument is tenuous, however, because after referring to the plea agreement as such, the prosecutor recanted his statements. The district court instructed the prosecutor to "make it clear that [Rhodes'] plea of guilty is to be considered by the jury only as it weighs on his own credibility." The prosecutor then stated to the jury: "I just got in a little trouble. . . . Mr. Rhodes' plea agreement comes in to you to solely assess his credibility and not as evidence against the Defendant in this case. And that's absolutely true." The district court then added: "The existence of that plea agreement is not evidence against anybody in this trial." Given these statements, the district court appears to have corrected any prejudicial effect of the reference to Rhodes' plea agreement. No abuse of discretion is apparent.

F. Discovery violation

Therm-All argues that the Government violated Federal Rule of Criminal Procedure 16(a)(1)(C) by failing to turn over certain telephone records of Therm-All employees during discovery.[9] As a preliminary matter, we note that Therm-All forfeited this argument by failing to raise it before the district court. "[P]lain forfeited errors affecting substantial rights should be corrected on appeal only if they 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Calverley*, 37 F.3d 160, 164 (5th Cir. 1994) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

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[9] Supreme does not appeal this point of error.

Consequently, unless the error is plain and affects Therm-All's substantial rights, we decline to find an abuse of discretion for the court's alleged failure to correct the error. *See id.* at 162.

The phone records that the Government failed to turn over represented phone calls that Therm-All employees made during the early 1990s. Therm-All points out that those records did not show that Engebretson (of Therm-All) or Smigel (of Therm-All) called Rhodes (of Mizell Co.) or Maloof (of Bay Insulation). Therm-All contends that this evidence demonstrated an absence of contact between the alleged conspirators, thereby making the evidence material to its defense.

Therm-All's argument does not rise to the level of plain error. Direct evidence existed that Therm-All participated in the conspiracy, including testimony that Smigel (of Therm-All) agreed to set prices, that Smigel and Rhodes policed the agreement, and that Engebretson (of Therm-All) was involved, all of which were corroborated by documentary evidence. Furthermore, if telephone records were important to its defense, Therm-All had the means and opportunity to establish what its own telephone records either proved or did not prove. In short, Therm-All has in no way demonstrated that the Government's action affected the fairness or integrity of the trial.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment against both Therm-All and Supreme.

United States Court of Appeals
Fifth Circuit
FILED

December 3, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20843

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THERM-ALL, INC., and
SUPREME INSULATION, INC.,
Defendants-Appellants.

Appeals from the United States District Court
For the Southern District of Texas

Before REAVLEY, JONES, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge.

This case concerns an alleged price-fixing agreement between two fiberglass insulation companies,

Therm-All, Inc. ("Therm-All") and Supreme Insulation, Inc. ("Supreme"). The issues on appeal are whether the government must prove that a defendant committed an overt act during the statute of limitations period in order to prove that a price-fixing agreement existed during that time, and if so, whether in the instant case the Government introduced evidence sufficient to prove such an overt act beyond a reasonable doubt. Because we hold that the government must prove such an act, and that here, the Government failed to do so, we reverse, vacate, and remand.

I. FACTS AND PROCEEDINGS

Therm-All and Supreme (collectively, the "Defendants") sell laminated fiberglass insulation to metal building manufacturers and contractors for use in metal buildings. During the 1990's, five companies, Therm-All, Supreme, Bay Insulation Supply Company ("Bay"), Mizell Brothers Company ("Mizell"), and CGI Silvercote ("CGI"), dominated the metal building insulation industry. In January 1994, the President of Therm-All, Robert Smigel ("Smigel"), allegedly agreed with the national sales manager for Mizell, Wally Rhodes ("Rhodes"), the President of Supreme, Tula Thompson ("Thompson"), and the sales manager of Bay, Mark Maloof ("Maloof") to increase product prices. Soon thereafter, CGI allegedly joined the agreement. The conspirators set prices within a marginal bracket, taking care not to set prices at the exact same level. No sales person was permitted to deviate from the prices as set forth on pricing sheets that the companies shared.

Therm-All, Smigel, Supreme, and Thompson were indicted on May 31, 2000 for conspiring to fix prices in violation of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1). A seven-week trial ensued. During the trial, the Government introduced convincing evidence

regarding the factual allegation that a price-fixing agreement existed from January 1994 to May 1995. Specifically, the Government showed that four significant price increases occurred within the industry in February 1994, July 1994, December 1994, and March 1995. In an apparent attempt to show that the conspiracy continued into June 1995, the Government produced testimony from a manager for Bay, Janne Smith ("Smith"). Smith stated that she "guessed" the conspiracy lasted until June 1995. Smith also stated that in June 1995, Maloof instructed her to lie to the grand jury regarding the price-fixing agreement. Similarly, Rhodes testified that the conspiracy lasted until June 1995, and that in June 1995, after receiving a grand jury subpoena, he instructed a plant manager to conceal documents which could implicate the manager.

The jury acquitted Smigel and Thompson, but found Therm-All and Supreme guilty. Therm-All and Supreme filed motions for judgment of acquittal and new trial, but the district court denied those motions. Thermal-All and Supreme timely appeal.

II. STANDARD OF REVIEW

This Court reviews *de novo* the denial of an appellant's motion for acquittal. *United States v. Medina*, 161 F.3d 867, 872 (5th Cir. 2002). A motion for a judgment of acquittal challenges the sufficiency of the evidence to convict. *See* FED. R. CRIM. P. 29(a). In ruling on the motion for acquittal, this Court reviews the evidence, all reasonable inferences drawn from it, and all credibility determinations in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Medina*, 161 F.3d at 872. This Court reviews the denial of a motion for new trial for abuse of discretion. *Miss. Chem. Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 365 (5th Cir. 2002). This Court upholds a jury verdict if "a

rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996).

III. DISCUSSION

The central issue in this case is whether the Government has produced any evidence of a Section 1 violation of the Sherman Act which was committed within the applicable statute of limitations period. According to 18 U.S.C § 3282, the government must prove that a defendant committed an offense within five years prior to a grand jury's indictment. Here, the grand jury indicted the Defendants on May 31, 2000, so the Government must produce evidence showing that a price-fixing agreement existed subsequent to May 31, 1995.

A. Legal basis for requiring an overt act

In most crimes of conspiracy, the government must show an overt act in furtherance of the conspiracy. *See, e.g., Grunewald v. United States*, 353 U.S. 391, 396-97 (1957) (requiring an overt act in furtherance of a conspiracy to defraud the United States through tax evasion); *United States v. Manges*, 110 F.3d 1162, 1169 (5th Cir. 1997) (holding that the government must show an overt act in furtherance of a conspiracy to defraud the United States through mail fraud); *United States v. Girard*, 744 F.2d 1170, 1172 (5th Cir. 1984) (recognizing the necessity of the government's burden to show an overt act in furtherance of a conspiracy to defraud the United States through bid rigging). The Defendants rely on the overt act requirement of these cases to argue that the Government must prove that the Defendants committed an overt act in furtherance of the price-fixing conspiracy during the statute of limitations. The Defendants assert that the Government has not presented evidence of any overt act in furtherance of the

conspiratorial agreement.

The Defendants's argument is misstated in the context of a Section 1 violation of the Sherman Act. Section 1 does not require proof of an overt act *in furtherance* of the conspiracy. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (citing *Nash v. United States*, 229 U.S. 373, 378 (1913)). "The heart of a Section 1 violation is the agreement to restrain; no overt act, no actual implementation of the agreement is necessary to constitute an offense." *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977); *accord United States v. Tarpon Springs Sponge Exch.*, 142 F.2d 125, 126 (5th Cir. 1944) (holding that an overt act is not necessary to consummate a conspiracy to restrain trade). Under Section 1, the price-fixing agreement itself constitutes the conspiracy crime. *Socony-Vacuum*, 310 U.S. at 224 n.59; *Flom*, 558 F.2d at 1183. Thus, the Government need not prove an overt act *in furtherance* of the price-fixing conspiracy.

Nevertheless, because the price-fixing agreement itself constitutes the crime, the Government must still show that the agreement *existed* within the statute of limitations time period. *See United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995). Failing to require the Government to show that the conspiracy existed during the statute of limitations period would create a presumption that the price-fixing conspiracy continued throughout that period. This would effectively extend the statute of limitations indefinitely, thereby obviating the statute of limitations requirement. To avoid such an outcome, the Government must offer sufficient evidence that the price-fixing agreement continued to exist within the limitations period.

The Government attempts to infer the agreement's continued existence from the fact that prices remained at

the same level a month after the last overt act occurred. This inference is doubtful. Merely showing that prices remain at a specific level does not prove beyond a reasonable doubt that a price-fixing conspiracy continues to exist. Prices are not perfectly elastic. Products usually have inelastic costs of production such that an immediate increase in output is not feasible. If a conspiracy ceases to exist, prices would not immediately decrease because output must at least temporarily remain the same. Thus, prices may remain unchanged a short time after the last act of conspiracy merely because of a product's price elasticity. Inferring a conspiracy based on the fact that prices remain unchanged shortly after the last overt act is therefore problematic.

Even if the Government could prove that prices remained at a raised level for a longer period than is necessary according to the price elasticity for laminated fiberglass insulation,[1] inferring that a conspiracy extends into the statute of limitations is still problematic. Products differ with respect to their specific price elasticities. Were this Court to allow an inference of conspiracy based on a particular product's price elasticity, this Court would effectively create a different statute of limitations for every individual product. Furthermore, exogenous market variables that are wholly independent from a price-fixing agreement may affect the supply or demand levels even while such an agreement is in effect. In such circumstances, prices would be permanently changed from their original level independent of the agreement. If the price-fixing agreement were to cease,

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[1] Demonstrating a product's price elasticity would be extremely difficult given the myriad of market factors that affect any product's supply and demand curves.

prices would not return to their prior level, and could remain at the same level as under the agreement. Consequently, the fact that prices remain at a specific level could simply indicate a natural market behavior. The Government must do more than show that a few prices correspond with a level set prior to the limitations period in order to show the continued existence of a price-fixing agreement.

To show the continued existence of a price-fixing conspiracy, the Government must show an overt act of, or in furtherance of, the alleged conspiracy. The Supreme Court has stated that while Section 1 does not require showing an act in furtherance of the conspiracy, the act of conspiring is itself a condition of liability. *Nash*, 229 U.S. at 378. Thus, to prove a conspiracy during a certain time period, the Government must produce evidence of an overt act that implies the existence of the alleged conspiracy during that time, regardless of whether the act be in furtherance of or an actual part of the conspiracy.

This standard is consistent with the holdings that our sister circuits have applied in similar cases. In *Hayter Oil Company*, the Sixth Circuit upheld a jury verdict that found the defendants guilty of conspiring to fix prices prior to the statute of limitations. 51 F.3d at 1265. While the court acknowledged that Section 1 did not require proof of an overt act, the court still required the government to show that an agreement existed within the statute of limitations period.[2] *Id.* at 1270. The

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[2] In dictum, the court attempted to bolster its position that the government produced sufficient evidence to show the continued existence of a conspiracy within the limitations period by stating that a conspiracy "is presumed to continue until there is an affirmative showing that it has been abandoned." *Hayter Oil*, 51 F.3d at 1270-71. However, this statement seems incorrect in the context of proving

government did so by producing phone records and testimony showing that within the limitations period, a conspirator repeatedly telephoned another conspirator to discuss increasing prices. *Id.* at 1271. Of particular significance was the fact that the testimony specifically detailed the conspiratorial subject matter of the telephone conversations. *Id.*

Likewise, in *United States v. Brown*, the Ninth Circuit ruled that a district court correctly stated the law when the court instructed the jury both (1) that the government did not need to show an overt act in furtherance of a price-fixing conspiracy, and (2) that the government must show an overt act in order to establish that the price-fixing conspiracy existed within the statute of limitations period. 936 F.2d 1042, 1048 (9th Cir. 1990).[3] This Court's holding in another conspiracy context also

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that a conspiracy exists within the limitations period. The presumption of a continuing conspiracy seems limited to inferring a price-fixing agreement once an agreement has already been established within the limitations period. *See United States v. Kissel*, 218 U.S. 601, 608 (1910). Indeed, the court's analysis in *Hayter Oil* seems to support this conclusion, despite the cited statement. The court examined whether the government had produced sufficient evidence to show the conspiracy's continued existence. *Hayter Oil*, 51 F.3d at 1271. Yet had the cited statement been correct, the court should have examined whether the *defendants* had produced any evidence that they had abandoned the price-fixing agreement. Thus, the court's analysis of the facts strongly suggests that the reason the court held that the price-fixing agreement existed within the limitations period was because evidence of conspiratorial overt acts existed. *Id.*

[3] While the Ninth Circuit reached this conclusion under plain error review, the court nevertheless explicitly stated that "the law was correctly stated." *Brown*, 936 F.2d at 1048.

implies that an overt act is necessary to show the continued existence of a price-fixing conspiracy within the statute of limitations. In *United States v. Girard*, this Court determined that because of an overt act, a conspiracy to defraud the United States extended into the limitations period. 744 F.2d 1170, 1173 (5th Cir. 1984). There, a plumbing company allegedly rigged the bidding process for a contract with the city housing authority before the five-year statute of limitations period had begun to run. *Id.* at 1171. The housing authority then paid the plumbing company for its contract services after the limitations period commenced. *Id.* This Court reasoned that the fulfillment of the conspiracy objective to earn profits under the contract was sufficient to show that the conspiracy itself existed within the statute of limitations. *Id.* at 1173. Pivotal to this conclusion was the fact that the incriminating economic benefit was a clear product of the conspiracy. *Id.* The plumbing company's overt act of accepting and retaining payment therefore extended the conspiracy into the statute of limitations period. *Id.*

The following factors thus support the conclusion that the government must show an overt act in the limitations period: (1) *Nash's* recognition of the necessity of an act in a price-fixing conspiracy; (2) the Sixth and Ninth Circuits's holdings in the same context; and (3) this Court's holding in an analogous context. We therefore hold that where a party has entered into a conspiracy in violation of Section 1, but has done so prior to the statute of limitations period, the government must show that during the limitations period, the defendant either committed an overt act of conspiring activity, or alternatively, committed an overt act in furtherance of the conspiracy.

B. Sufficiency of the Government's evidence of an overt

act

The Government failed to offer evidence of any overt act supporting the inference that the conspiracy continued to exist after May 31, 1995. The five pieces of evidence that it did offer into evidence fall short of satisfying this requirement. A summation of this evidence follows.

First, the Government offered conclusory testimony. Rhodes opined that the agreement lasted until June 1995; Smith testified that she "guessed" the agreement lasted until subpoenas were issued in June 1995. But neither Rhodes nor Smith testified about any acts occurring after May 31, 1995 to substantiate their opinions. Neither witness's testimony offers evidence of any overt act within the statute of limitations.

Second, the Government attempts to show an overt act by introducing testimony that a Therm-All employee, Mr. Engebretson, transmitted a facsimile to an employee of CGI in June 1995. This evidence is inconclusive. "When the government attempts to prove the existence of a conspiracy by circumstantial evidence, each link in the inferential chain must be clearly proven." *United States v. Galvan*, 693 F.2d 417, 419 (5th Cir. 1982). Based on this principle, this Court has stated that "telephone records are *insufficient* evidence to support a conspiracy conviction unless the government can show who participated in the calls *and the substance of their conversation.*" *United States v. Williams*, 264 F.3d 561, 574 (5th Cir. 2001) (emphasis added). In *Galvan*, this Court determined that evidence of telephone conversations between conspirators was not, by itself, sufficient to prove that the conspirators discussed the criminal activity. 693 F.2d at 419. In the instant case, Mr. Engebretson simply testified that a facsimile transmission occurred. No evidence suggested that the

subject of the facsimile concerned product pricing. While the transmission was certainly an overt act, the Government did not demonstrate that the act was in any way relevant to the alleged conspiracy. In accordance with *Galvan* and *Williams*, the record of the facsimile transmission is insufficient to prove the existence of the alleged conspiracy.

Third, the Government offered invoices dated in June 1995 from four of the conspiring companies. The prices listed on the invoices corresponded with the pricing sheets that were conspiratorially promulgated prior to May 31, 1995. The Government claims that these invoices show that the conspirators were realizing an economic benefit of the conspiracy within the statute of limitations time period. Relying on *Girard*, the Government argues that the realization of this economic benefit establishes that the conspiracy existed within the relevant time period.

Although the Government is correct that realization of an economic benefit can show the existence of a conspiracy within the limitations period, the economic benefit must nonetheless be clearly tied to the conspiracy. In *Girard*, the sole reason that the conspirators received the contract benefit was because of the conspiracy. 744 F.2d at 1172-73. Here, however, the economic benefit stated on the invoices cannot clearly be tied to the Defendants' former price-fixing agreement. The Government produced only 90 invoices from all four companies' combined records to prove that a price-fixing agreement continued into June 1995.[4] These invoices

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[4] Ironically, the Government did not provide this Court with the invoices that did not correspond to the price-fixing sheets because of the burden that such a "voluminous exhibit" would create.

constituted only five percent of sales during that time. Five percent of sales corresponding with the prior agreement is hardly sufficient to infer the agreement's continued existence. This evidence does not demonstrate that the companies were at that point developing, carrying out, or reaping the fruit of the prior agreement. Indeed, the dearth of corresponding prices strongly suggests that the agreement no longer existed. It seems eminently likely that more than five percent of sales would have reflected conspiratorial behavior had the companies continued pricing according to the agreed-upon marginal brackets.

It is also noteworthy that the Government did not produce the invoices at trial to prove price-fixing within the limitations period. The Defendants stipulated to the invoices for the sole purpose of showing interstate commerce activity. As an afterthought on appeal, the Government relies on the invoices to argue a point outside the scope of the stipulation. This fact, combined with the blatant absence of corresponding prices, is more than sufficient to conclude that the 90 invoices fail to prove *beyond a reasonable doubt* that the conspiracy existed during the limitations period.

Fourth, the Government produced evidence that Maloof and Rhodes attempted to conceal the conspiracy in June 1995. Specifically, Smith testified that in June 1995, Maloof instructed Smith not to tell the grand jury that the companies had ever entered a price-fixing agreement. At about the same time, Rhodes testified that after receiving a grand jury subpoena, he told a plant manager to conceal documents which could implicate the manager. The Government contends that these acts of concealment show that the conspiracy existed in June 1995.

Acts of concealment may constitute overt acts indicating the existence of a conspiracy. *Grunewald*, 353

U.S. at 405. Such acts must be "done in furtherance of the main criminal objectives of the conspiracy" rather than those done "for the purpose only of covering up after the crime." *Id.* This Court has applied this principle in *United States v. Mann*, 161 F.3d 840, 859 (5th Cir. 1998). In *Mann*, this Court held that an act of concealment evinced an overt act for limitations purposes because "[t]he central aim of the conspiracy extended to concealing the fraudulent nature of the transaction." *Id.* There, the indictment alleged a conspiracy to "hide and keep concealed . . . true facts and circumstances surrounding the acquisition, financing, operation, and management of [a financial institution]; [and] to hinder and defeat the [IRS] in the ascertainment . . . of income tax . . . ." *Id.* "[T]he purpose of the main conspiracy . . . by its very nature, called for concealment." *Id.* Furthermore, this Court held that to be an overt act, statements of concealment must be "made solely to aid the concealment . . . [,] made during and in furtherance of the charged conspiracy." *Id.*

In the instant case, at the outset of a price-fixing conspiracy, conspirators do not contemplate making such statements of concealment as those which Maloof and Rhodes made. Their statements instructing others to lie to a grand jury and to conceal conspiratorial documents do not fulfill the main purpose of a price-fixing agreement—to raise and maintain prices. Indeed, their statements seem to cover up the main conspiracy, indicating "nothing more than that the conspirators [did] not wish to be apprehended—a concomitant, certainly, of every crime . . . ." *Grunewald*, 353 U.S. at 406. The statements do not show the continued existence of a price-fixing conspiracy.

Fifth, the Government offers tape-recorded conversations of May 4, 2003 and May 5, 2003 showing

that the conspiracy was effective on those dates. It also offers testimony of a Mizell salesman that he submitted a bid on May 15, 2003 which was based on a conspiracy pricing sheet. This evidence is highly persuasive that the conspiracy existed up through May 15, 1995. It is impotent in showing that the conspiracy existed past May 31, 1995. The Government thus fails to produce evidence of an overt act occurring after the critical limitations date.

IV. CONCLUSION

Because the Government failed to provide evidence that the conspiracy existed beyond May 31, 1995, the district court should have granted the Defendants's motion for acquittal. We therefore REVERSE and VACATE the judgment, and remand for a ruling not inconsistent with this holding.

REAVLEY, Circuit Judge, dissenting:

I respectfully dissent. The jury was instructed that the government had to prove "that the conspiracy charged in the indictment continued after May 31, 1995," and that it could so find "only if the government has proven that some action was taken by a conspirator in furtherance of the conspiracy after that date." I do not understand the majority or appellants to find any fault with the court's instructions relevant to limitations, and I would hold that a rational jury could have found beyond a reasonable doubt that action in furtherance of the conspiracy occurred after May 31, 1995.

In the case of a price-fixing agreement, the exchange of pricing information by the conspirators, and the charging to customers of artificially inflated prices made possible by the conspirators' illegal collusion, constitute acts in furtherance of the conspiracy. This jury could find that such overt acts in furtherance of the conspiracy did occur within the limitations period.

The government proved a highly successful conspiracy to fix prices for an essentially fungible product sold by appellees and other conspirators. The agreement made possible a series of price increases above the prices that would have prevailed in a competitive environment, as evidenced by proof that prices and profit margins rose significantly after the agreement was reached, and prices dropped significantly after the government issued subpoenas to the conspirators. It is logical to believe that the conspirators, once having decided to break the law for financial gain, would continue to charge illegally fixed prices until they were caught. Hence, the Sixth Circuit has stated that "once a conspiracy has been established, it is presumed to continue until there is an affirmative showing that it has been abandoned." United States v. Hayter Oil, Inc., 51 F.3d 1265, 1270-71 (6th Cir. 1995).

Even if the law of our circuit does not presume as a matter of law, for limitations purposes, that a price-fixing conspiracy continues until the participants are caught, and even if the jury in the pending case was not so instructed, the jury could have reasoned that the participants would have no reason to abandon their profitable conspiracy until such time. Indeed, the conspirators managed three rounds of coordinated price increases in 1994, and a separate price increase for unfaced insulation in 1995. They apparently had no interest in voluntarily abandoning their illegal pact and returning to a competitive market.

The jury heard evidence that (1) the conspirators entered into a horizontal price-fixing agreement, the most blatant of Sherman Act violations; (2) the conspirators engaged in an extensive, organized effort to maintain the agreement by exchanging ongoing pricing information, and to conceal the agreement by charging slightly different prices; (3) the agreement was successful at raising prices and profits for the conspirators; (4) in June 1995 the conspirators continued to charge customers pursuant to price lists agreed upon under the price-fixing agreement, as evidenced by numerous examples of invoices and corresponding price lists admitted at trial; (5) prices dropped after the issuance of subpoenas in June of 1995, and had "dropped dramatically" according to one witness by the time of trial; (6) Mark Engebretson of Therm-All was an active participant in the conspiracy, was involved in the exchange of pricing information and fixing of prices, had talked to Roger Ferry of CGI about pricing, and had communicated with Ferry by fax and phone into June 1995, although the contents of the June 1995 communications were not explicitly revealed at trial; (7) when asked when the price-fixing agreement ended, Jaane Smith of Bay, the whistleblower, testified, "I guess

after people started getting served subpoenas" in June of 1995, and later testified, with respect to what was "happening in the marketplace" after the subpoenas issued, that "[t]hings started returning to how they were before and things started becoming more competitive again;" and (8) Huber Rhodes, a Mizell vice president, active participant in the conspiracy, and key government witness, testified that the price-fixing agreement continued until June of 1995, "when the FBI came in Mizell Brothers with a subpoena from the Justice Department." This evidence was sufficient to prove that overt acts in furtherance of the conspiracy, especially the continued charging of agreed, artificially high prices to customers, as well as the continued exchange of pricing information, occurred within the limitations period.

(any footnotes trail end of each document)
IN THE UNITED STATES DISTRICT C OURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-00-362

6/10/02

UNITED STAES OF AMERICA

V.

ROBERT L. SMIGEL
THERM-ALL, INC.,
TULA D. THOMPSON, AND
SUPREME INSULATION, INC.

MEMORANDUM AND ORDER

Pending before the Court are Defendant Supreme Insulation, Int.'s Motion for Acquittal or in the Alternative New Trial, filed pursuant to Federal Rules of Criminal Procedure 29(c) and 3.3 [Doc, # 290, and the Motion of Defendant Therm-All, Inc. fox Judgment of Acquittal, or for New Trial [Doc., # 295]. The Government has responded and Defendants have replied. The motions are ripe for determination. The Court concludes, after careful consideration of the trial record, the parties' arguments, and the applicable authorities, that the motions should be denied. The evidence is sufficient to sustain the jury verdicts of guilty as to Defendants Supreme Insulation, Inc. and Therm-All, Inc., the charges are not time barred, and no new trial is warranted.

I. PROCEDURAL BACKGROUND

The indictment in this criminal antitrust case was returned an May 31, 2000, against Therm-All Inc. ("Therm-All"), its president, Robert L. Smigel, Supreme Insulation, Inc. ("Supreme"), and its president, Tula D. Thompson. The indictment charges that beginning in or about January 1994 and continuing at least until June 1995, Defendants and others entered into and engaged in a conspiracy to suppress and restrain competition by raising, fixing and maintaining prices of metal building insulation said from various facilities operated by Defendants in several regions of the United States, which conspiracy was an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Antitrust Act (1S U.S.C. § 1).[fn1] The indictment also alleges as alternative objects of the conspiracy that Defendants monitored and enforced others' compliance,, with the agreement. All Defendants denied this charge. The Government contended and the Court held that the indictment alleged a per se violation of § 1 of the Sherman Act,

The trial of this case lasted almost seven weeks. The evidence is voluminous. The Court will not detail it here, but summarizes its themes, in the light most favorable to the guilty verdicts of Supreme and Therm-All. The Government adduced evidence demonstrating that Wally Rhodes of Mizell Bros. Co., Mark Maloof manager for Bay Industries Inc. and its affiliate Bay Star of Texas, Inc,), Peter Yueh of Bright Insulation, Inc., Mark Engebretson of Therm-All, and Roger Ferry of CGI, Inc. were among the conspirators.

The evidence was uncontradicted that meal building insulation competitors issued three significant price increases in 1994: on or about February 1,[fn2] July 15, and December 15. There was also a price increase for unfaced insulation (and possibly freight) in or about

March 1995. There was never a published price decrease during the conspiracy period.

The Government's evidence also demonstrated that published price sheets became common in the metal building insulation in early 1994, contrary to the prior practice of many of the competitors. The evidence was uncontradicted that there had been cut-throat competition in the metal building insulation industry in 1993, so vicious that an attempted price increase only resulted in a price decline. There is no dispute that the price of fiberglass, the primary component of metal building insulation, increased in early 1994. Fiberglass manufacturers increased their prices three times in 1994, after giving several months' notice to their metal building insulation manufacturer customers. The restriction of availability of fiberglass supplies ("allocation") to metal building insulation manufacturers, including the conspirators, began in approximately January 1994 and continued in most regions through late 1994. The competing metal building insulation manufacturers used these price increases and the allocation of fiberglass as the explanations to their customers for the price increases they implemented in 1994, and possibly early 1995, The Government relied on the testimony of Rhodes as direct evidence that there were various conversations between Rhodes, Maloof, and other conspirators with the Defendants in which they all reached agreement to use published price sheets, to hold to the published prices and, to some extent, to charge certain prices for the metal building insulation products. Nevertheless, the competitors did not strictly adhere to their published price sheets when they made many bids on jobs they really wanted. Instead, they often discounted from their published prices. Despite the discounting, each time there was a published increase, Defendants and the other

conspirators obtained prices for their metal building insulation materially above the prior sums they had earned.

The Government also relied on evidence from telephone call summaries ("phone logs") reporting long distance and cell phone calls among Defendants and other conspirators during the few months prior to and shortly after each price increase. These logs revealed frequent communication in the two or three months prior to and at approximately the times of the conspirators' price increases. Rhodes, Supreme salespeople James Miranda and Linda Welty, and Mizell salesmen Leif Nilsen and Jack Mingle, testified that they made or received phone calls checking an whether bids were consistent with the current published prices and, if not, why. The Government also relied on inferences from conduct by Therm-All salesman Mark Engebretson that his communications with competitors' salesmen were efforts to set and maintain (or enforce) agreed prices during the conspiracy period.

Grand jury subpoenas were served on various conspirators on June 22, 1995, As noted, the indictment in this case was returned almost five years later, on May 31, 2000.

Trial in this case began an September 4, 2001, and ended with a jury verdict on October 17, 2001. The jury found Therm-All and Supreme guilty but acquitted the companies' presidents, Thompson and Smigel.

Both corporate Defendants have filed extensive motions far judgments of acquittal pursuant to Rule 29(e) of the Federal Rules of Criminal Procedure or for new trials pursuant to Federal Rule of Criminal Procedure 33. These motions incorporate arguments made in connection with unsuccessful Rule 29 motions lodged during trial.

II. ANALYSIS

A. Sufficiency of the Evidence-Both Convicted Defendants

Defendants Supreme and Therm-All strenuously argue that the evidence was insufficient to support the guilty verdicts in this case, and seek entry of a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). The Court disagrees far the reasons discussed below,

1. Legal Standard for Judgments of Acquittal.

The standard for evaluating a motion for judgment of acquittal is whether any reasonable trier of fact could have found that the evidence established the essential elements of the charged crime beyond a reasonable doubt. United States u Duncan,164 F .3d 239,242 (5th Cir. 1999) (citing United States v. Pennington, 20 F.3d 593, 597 (5th Cir, 1994)); [In United States v. Alix, 86 F.3d 429, 435 (5th Cir. 1996). The Court considers "the evidence, all reasonable inferences drawn from it and all credibility determinations in the tight most favorable to the Government, and [must] affirm if a reasonable jury could find the offense's of the Evidence - Both Convicted Defendants essential elements beyond a reasonable doubt." United States v Herrara, 289 F.3d 311,317 (5th Cir. 2002) (citing United States v. Medina, 161 F.3d 867, 872 (5th Cir. 1998)). See United States v. Ivy, 973 F.2d 184,1188 (5th Cir.1992); United States v. Mensses, 962 F.2d 420 426 (5th Cir.1992); United States v. Sanchez, 961 F, 2d 1169, 1173 (5th Cir.1992). "This is not to determine whether or not the jury's decision was rational." Herrera, 289 F.3d at 317 (citing United States v. Miller, 146 F.3d 274 280 (5th Cir. 1998) (citing United States v. Dean, 59

F.3d 1479, 1484 (5th Cir. 1995))). The Fifth Circuit has stated: "We recognize that the jury was free to choose among all reasonable construction of the evidence, and we accept all credibility choices that tend to support the jury's verdict." Dean, 59 F.3d at 1484 (citation and quotations omitted). The jury, as the fact finder, is solely responsible for determining the weight and credibility of the evidence. United States v. Martinez, 975 F.2d 159,161 (5th Cir.1992), The Court may not substitute its own credibility determinations for that of the Jury. Id. See United States v. Jaramillo, 42 F3d 920, 923 (5th Cir. 1995) (court looks to whether the jury made a rational decision, not whether it correctly determined defendant's guilt or innocence). "However, [a court] must reverse conviction if the evidence construed in favor of the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged." Jaramillo, 4 F.3d at 923 (internal quotation marks omitted).

2. Analysis of Sufficiency of the Evidence

The Government presented evidence, when viewed in the light most favorable to the verdicts, sufficient to support the finding of guilty against both Supreme and Therm-All. A judgment of acquittal based on insufficiency of the evidence is not warranted as to either of these Defendants.

The indictment charged the Defendants with conspiring to restrain trade by fixing prices of metal building insulation, in violation of Sherman Act, § 1. To prove that a Defendant was guilty of price fixing, the Government was required to prove beyond a reasonable doubt that (1) the conspiracy to fix prices of metal building insulation was knowingly formed, and was

existing at or about the time alleged; (2) that the Defendant under consideration knowingly became a member of the conspiracy; and (3) that the conspiracy either affected interstate commerce or occurred within the flow of interstate commerce. See United States v. All Star Industries, 962 F.2d 465, 474-75 & n.21 (5th Cir, 1992) (citing with approval United States v. Cargo Service Stations, Inc., 6S7 F.2d 676, 683-84 (5th Cir. 1981))

Acquittal of Individual Defendants, Defendants first contend that their motions far acquittal should be granted because the jury found Smigel, Therm-All's president, and Thompson, Supreme's president, not guilty of the conspiracy charged. Defendants point out that the Government's evidence, if believed, demonstrated that Defendant corporations joined and participated in the conspiracy in large part through conduct of these officers. This argument fox acquittal is rejected, Acquittal of certain defendants does not affect the validity of guilty verdicts of other defendants. In the Fifth Circuit, consistency of jury verdicts among co-defendants is not required. United States v. Zunniga-Salinas, 952 F.2d 876, 878 (5th Cir. 1992) United States v. Branch, 91 F.3d 699, 722 (5th Cir. 1996); United States v. Cargo Service Stations, Inc., 657 F.2d 676, 679 (5th Cir.1981). Inconsistency in a jury's verdict in a criminal case is not a basis for setting the verdict aside. Branch, 91 F. 3d at 722. See United States v. Cordon, 780 F.2d 1165,1176 (5th Cir. 1986); United States v. Mollier, 853 F.2d 1169, 1176 (5th Cir. 1988) (a jury may convict one defendant and acquit a co-defendant of the same crime).

In assessing the sufficiency of the evidence against a defendant, the Court must consider all the evidence of record against that defendant in the light most favorable to the guilty verdict. United States v. Dunn, 284 U.S.

390,392-93 (1932); United States v. Hughes Aircraft Co., Inc., 20 F.3d 974, 978 n.5 (9th Cir. 1994). It is black letter law that an acquittal is not the equivalent of a factual finding of innocence or failure of proof on the part of the prosecution. See United States v. Powell, 469 U.S. 57,67-68 (1984)

Having carefully considered the testimony, documentary evidence issued by the conspirators, the Government's phone logs, and other extensive circumstantial evidence, the Court concludes that there was more than sufficient evidence for the jury to find Defendants Therm-All and Supreme guilty of the conspiracy charged in the indictment.

General Contentions of Insufficiency of Evidence. Defendants do not meaningfully contend that there was no price fixing conspiracy; rather, Defendants contend that they were not members of any illegal conspiracies that may have existed, and that the quality and quantity of evidence of their guilt is legally insufficient,. Defendants' arguments lack merit.

The essence of the conspiracy was that conspirators, including Defendants Therm-All and Supreme, were able repeatedly to raise their published standard prices for various types of metal building insulation to cover fiberglass cost increases, and were able to do so without serious concern that competitors would publish and routinely accept significantly lower profit margins thereby underselling Defendants. Defendant Supreme argues that the Government's evidence is insufficient because there was extensive testimony allegedly contradicting the Government's theory, and because many prices on the Supreme price lists were different from other competitors prices, both in the structure of the price sheets and the specific prices included in the sheets, during the conspiracy period. Both

Defendants also point to their numerous sales of products below the prices on the price sheets. Defendants also contend that, to the extent the pricing among the companies was similar for popular products, the cause was normal market forces, not an unlawful conspiracy. Further, Defendants point to testimony that on occasion the customers seeking bids of metal building insulation world give the bidder a competitor's price list to aid in the bidder's bid preparation, so the existence of a competitor's price list in a company's files was not incriminating. These arguments are unavailing.

The Government was entitled to rely on circumstantial evidence to prove a Defendant's joinder or active participation in the conspiracy. Herrera, 289 F.3d at 317. ("The evidence to support a conspiracy conviction need not show an explicit agreement; a tacit agreement is enough. .Id. (citing United States v. Westbrook, 19 F.3d 1176, 1189 (5th Cir. 1997)). "'The government can prove the existence of a conspiracy by circumstantial evidence alone.'" Id. (citing Medina 161 F. 3d at 872); accord United States v. Pena-Rodriguez, 110 F.3d 1120,1123 (5th Cir. 1997) (citing United States v. Leal, 74 F.3d 600, 606 (5th Cir. 1996)). "As long as it is not factually insubstantial or incredible, the uncorroborated testimony of a co-conspirator, even one who has chosen to cooperate with the government in exchange far non-prosecution or leniency, may be constitutionally sufficient evidence to convict." Herrera 289 F. 3d at 318 (citing Westbrook,119 F.3d at 1190); Pena- Rodriguez 110 F. 3d at 1123 (citing United States v. Bermea, 30 F.3d 1539, 1552 (5th Cir.1994)).[fn5]

As to Supreme, the record contains extensive direct evidence from Wally Rhodes, national sales manager for Mizell, that he and Thompson (an behalf of Supreme) agreed on several occasions to raise metal building

insulation prices to similar degree. The parties agreed during various conversations or other communications[fn6] in or about January 1994, through conversations and faxing of price sheets in May and June 1994, and in communications he had with her in late September 1994. There also was circumstantial evidence supporting Rhodes' testimony. For instance, Leif Nilsen, a Mizell salesperson and plant manager in California testified that the biggest selling product in California was 3" white vinyl . The price sheets demonstrated that Mizell's, Supreme's and Bay's pricing (in the West) far this product were within a few dollars of each other (see GX 42B, 40A and 43B).[fn7] Also, Rhodes testified that he and Thompson met far breakfast in March 1995, at which time he gave her the new Mizell (Western) price sheet.[fn8] Rhodes testified that although he exchanged price sheets with Thompson before each price increase to get their prices generally in line, they did not match the paces exactly because that would have been too suspicious to customers.

The existence of an agreement between Rhodes and Thompson (for Supreme) was corroborated by Leif Nilsen. Nilsen testified that Rhodes would call and chastise him when he discounted prices, Rhodes mentioned in this context several times that he had an agreement with "Tina." Supreme's sales people, Linda Welty and James Miranda, testified with conviction that they were instructed not to discount from the published price sheets without permission from Thompson or her assistant.[fn9] There was also other testimony about various price enforcement telephone calls. Miranda testified that Thompson, on at least one occasion after receiving a report that Mizell had offered a discounted price in a bid, told him that she would "call Wally because that is not supposed to happen." This summary is merely

a sampling of the available evidence. The record is sufficient, when construed in the light most favorable to the Government, to support the guilty verdict of Supreme.

There also is ample evidence that Therm-All knowingly joined and participated actively in the conspiracy to fix and maintain prices in 1994 and 1995. Illustrative of the evidence supporting the verdict is that Rhodes testified about several conversations in which the participants agreed to raise the prices, stick to the new price sheets, and not jump brackets. Rhodes testified that he personally had one such conversation with Smigel (who spoke on behalf of Therm-All) in late 1993 and that Maloof reported a similar conversation with Smigel in early January 1994. Rhodes also testified that CGI joined the price agreement and that it was Smigel who talked to CGI about the agreement. Testimony by Jack Mingle, a Mizell salesman in the Northeast, corroborated Rhodes' reports of Smigel's involvement. Mingle stated that Rhodes told him that Rhodes had an agreement with Therm-All (through Smigel) to use new and higher published price sheets to sell their products., Mingle stated further that Rhodes reported (through communications Rhodes had with Smigel) that CGI had agreed to do the same.

Rhodes' testimony was corroborated by certain Therm-All price sheets. Therm-All implemented its price increases on virtually the same schedule as several other conspirators. Rhodes stated that he exchanged price sheets with Therm-All[fn10] and Rhodes prepared the Mizell Northern region price sheet with reference to Therm-All's prices for the first increase. Rhodes testified that he faxed his draft to Smigel a few days before Mizell's increase became effective.[fn11] As to the second price increase, Rhodes testified that Maloof stated he

received a price sheet from Smigel on which they relied to set new prices.[fn12] Rhodes testified that he talked to Smigel regarding the third increase in 1994, and that they talked again in connection with the 1995 increase, which covered only unfaced insulation.[fn13] Rhodes also stated that he talked to Engebretson (Therm-All's Wisconsin manager) on March 20, 1995 about panel insulation pricing, made some notes of the conversation and faxed him Mizell's proposed Northern price sheet.[fn14] These conversations were corroborated to same extent through the Government's phone lags evidencing the existence of various Song distance phone calls (or cell phone calls) and facsimiles among these parties.[fn15]

There also was testimony from several witnesses about numerous instances of Therm-All salespeople being told to "stay on" the price sheets and not discount prices for bids. These reminders also were put in writing by Dennis Kaczmarek, Therm-All's Vice President, in late 1994, when other witnesses testified that allocation was over.[fn16] Further, there was evidence that Therm-All actively monitored others' compliance with the agreement. Rhodes testified that Smigel and Maloof called Rhodes on occasions when Mingle quoted a job in violation of the agreement. These events were corroborated by Mingle, who received calls from Rhodes questioning him about the matters.

The testimony of Janne Smith, former employee of Bay Star of Texas, Inc., interpreting taped comments by conspirator Maloof, sales manager with Bay Industries Inc. constituted other probative evidence that Defendants Supreme and Therm-All both joined and participated actively in the price fixing conspiracy.

Defendants' arguments are unavailing because they relate merely to the weight of the Government's case and not its legal sufficiency. In any event, the fact

that the competitors did not agree to conform all prices an all products does not automatically defeat the Government's theory. The evidence (testimonial and documentary), when construed in favor of the guilty verdicts, is sufficient to establish that both corporate Defendants and other conspirators agreed on prices for the popular products for which there was strong competition within a region, especially for sales quantities that the conspirators believed were significant financially. The distinctions among the pricing structures and prices of specific products were delineated carefully to the jury by defense counsel. The jury was permitted to reject Defendants' contentions that these distinctions were evidence of Defendants' lark of agreement to Join any conspiracy. Rather, the jury was permitted to find the distinctions evidence of the limits of the scope of the conspiracy.

Furthermore, it is not necessary to a guilty finding that Therm-All or Supreme agreed to join the conspiracy for the entire time it existed, or that the Defendants agreed to all prices for all products, far all quantities, or fox all four price increases. Agreement try any portion of the conspiracy is sufficient. See, e.g., United States v, Tucker, 526 F.2d 279, 283-84 (5th Cir. 1976); see also United States v. Castro, 89 F.3d 1443, 1451 (11th Cir. 1996) (citing United States v. Pepe, 747 F. F. 2d, 632, 659-60 (11th Cir. 1984)).

The Court has considered Defendants' evidence of transactions by their own sales staffs during the conspiracy period at prices below (sometimes substantially below) the published price for the quantity involved. The Court also is aware of Defendants' arguments, supported by certain exhibits, that same of Defendants' announcements about the companies' new prices to their customers may have preceded certain

allegedly pertinent communications an which the Government relied. Nevertheless, these points do not establish legal insufficiency of the evidence.

The evidence that many of Defendants' sales were "off" its published prices and that Supreme increased its market share during the conspiracy period is circumstantial evidence from which the jury was entitled to draw any inference it deemed reasonable. Defendants suggest that this evidence means that Defendants did not join the conspiracy. However, the evidence, contrary to Defendants' contentions, was susceptible to alternative inferences. The jury was permitted to conclude that the Defendants joined the conspiracy but that they were not fully committed to it or that their sales people refused to comply with management's directives, and thus the agreement was not faithfully enforced by Defendants.[fn17] Defendants' evidence does not as a matter of law defeat the Government's proof that Supreme and Therm-All in fact knowingly and willfully joined the conspiracy, at least for some period of time See also Tucker, 526 F.2d 283-284 (a conspirator joining an unlawful conspiracy need not be a participant far the duration of the conspiracy).

Defendants emphasize that their announcements of impending price increases often preceded the communications Rhodes claimed to have had with Defendants. This contention does not warrant a finding of insufficiency of the evidence because the jury was not bound to conclude that the dates on Therm-All's and other companies' letters to their customers announcing meal building insulation price increases necessarily reflected the dates that the letters were sent.[fn18] The evidence must be considered in the light most favorably to the verdict. Also, it is not clear that all the letters an which Defendants rely were accompanied by any price

lists, let alone Defendants' final price lists for each of the increases.

Defendants further contend that similarity of pricing is not, by itself, any evidence of a conspiracy. The Court recognizes that mere exchange of price information is insufficient. However, the evidence the Government adduced is substantially more incriminating than the mere exchange of pricing, as discussed in the cases on which Defendants rely. See United States v. Andres, 216 F.3d 645, 688 (7th Cir. 2000); United States v. Bestway Disposal Corp., 724 F.Supp. 62, 67-68 W.D.N.Y. 1988. When competitors agree with one another, expressly or implicitly, to publish similar prices and then use those published lists as the baseline far bidding an sales of competing products, the competitors are violating the Sherman Act, and are engaging in activity materially different from that condoned by the courts in Andres or Bestway. The jury was permitted to consider similarities of the conspirators' (including Defendants') price sheets in conjunction with other evidence the jury found incriminating.

Aside from the principle that Defendants' arguments largely relate to the weight of the Government's case not its legal sufficiency, Defendants' contentions did not go unanswered by the Government. The Government argued, supported by simple logic, certain gaps in these defense arguments. Defendants' evidence did not address all their price increases. Defendants, through senior management, strenuously and repeatedly urged sales people not to discount their prices. The phone logs revealed substantial phone activities at incriminating times. The absence of evidence of a phone call on the Government's phone logs did not necessarily mean a conversation did not occur while the logs were comprehensive, they admittedly were incomplete. The

logs contained only information of cell phone calls and long distance toll calls from phone numbers typically used by the conspirators. Local calls and face-to-face conversations among the conspirators were not included in the summaries. Moreover, the logs did not cover all periods during the conspiracy. There are gaps in time between price increases when conversations that did not appear on the logs could have occurred. The fiberglass suppliers' public announcements months in advance of their price increases gave Defendants and other conspirators both the incentive and the public excuse to implement their own price increases in coordination with their competitors. The evidence permits the inference that Defendants and other conspirators adopted similar increased prices in 1994 and in March 1995 to mimic the cost increases for fiberglass knowing that other metal building insulation competitors would do the same.

Proof of an implicit agreement and circumstantial evidence of coordinated parallel action are sufficient to prove a conspiracy.

Defendants make the corollary arguments that the evidence of record is, at best, "as consistent with permissible competition a with illegal conspiracy," and thus is insufficient to support a guilty verdict since such verdict must rest on "evidence that tends to exclude the possibility of independent action," Matsushita Inc. Indus. Co., Ltd. v. Zenith Radio Corp,, 47 U.S. 574, 588 (1986); Monsanto Co. v. Spray-Rite Serv. Corp,, 465 U.S. 752, 768 (1984). Defendants contend in this vein that the evidence reflects conduct consistent with unilateral (and thus legal) action by competitors in response to prevailing market conditions. See United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978), Therm-All argues that, "as a matter of fundamental economics," there was "no need for agreement in order for prices to

rise during allocation."[fn 19]" The Court does not agree that the evidence, when construed in the light most favorable to the guilty verdict, is as consistent with guilt a innocence. At the very least, Rhodes' testimony that Thompson and Smigel told him (or Maloof) that they agreed to several of the proposed price increases defeats Defendants' contention here. Further, the jury was permitted to rely on a combination of circumstantial evidence: that prices for popular products were similar, price increases were effective at the same tine; that copies of certain competitors' new price lists were discovered in the Defendants' corporate files (or their drafts in others' files), on occasion with the indication that the price sheets was faxed before the effective date of the price increases, and the frequency of telephone calls at suspicious times.

Defendants focus on their economists' testimony that, in periods of product scarcity, prices ordinarily will rise. However, the jury was not required to accept this testimony as accurate, or as the only persuasive explanation for the large price increases that Defendants actually implemented, The jury was entitled to consider the expert testimony in light of the testimony of Rhodes and others that prior to the conspiracy, competitors were unsuccessful in their attempts to raise prices." Moreover, fiberglass shortages and price increases did not mean that Defendants and their competitors were required to raise prices to offset the entire cast increase of the product component. The theory of supply and demand does not guarantee that sellers of a manufactured product will he protected from reductions in their profit margins when adjusting to increases in cost of product components. Given the conspirators' prior experience in 1993, they had good incentive to agree on increased prices to assure they

would be able to cover the cost increases.

Possibly most important, evidence revealed that allocation (i. e. fiberglass shortages) did not affect each competitor to the same degree or for the same length of time, and yet all competitors raised prices by roughly the same amounts, Further, the evidence is uncontradicted that allocation eased. in the last quarter of l994 and ended in late 1994 or very early 1995. "bet, the competitors, including Defendants, did not formally lower their prices. In fact, in 1995 , their published price lists stayed the same, except that some raised the prices on unfaced insulation and/or freight. Under defendants' economists' theories, the availability of ample metal building insulation by 1994 should have revived active competition. But, it does not appear to do so until the grand jury subpoenas were served.

Defendants also point to evidence that there were other legal purposes for the many phone calls on which the Government focuses.[fn20] Thompson (and for awhile, Smigel) was deeply involved with the rejuvenation of a metal building insulation trade association and was responsible for many related Organizational matters. These are matters that the ,jury could - and most likely did - consider in connection with assessing the weight of the evidence.

Therm-All also points out that it did not own the Pennsylvania plant until early 1994, and thus had no incentive to agree to prices with Mizell or other metal building insulation sellers in that region in early 1994, as Rhodes testified. The Court concludes that this argument does not ultimately defeat the jury's guilty finding. Based on the circumstantial documentary evidence and Rhodes' direct testimony about his conversations with Smigel and other representatives before each price increase, the ,jury was entitled to infer that during same part of the

conspiracy period, Them-All agreed with others to raise their prices in reliance an competitors doing the same. Ultimately, the jury had to make credibility findings and had to assess the weight of all the proof and arguments before it. The jury had sufficient direct and circumstantial evidence to find Defendants Therm-All and Supreme guilty beyond a reasonable doubt., The Court simply cannot conclude as a matter of law that the voluminous evidence in the record was insufficient to support these verdicts.

Reassertion of Trial Motions for Acquittal.- Defendants, finally, refer and reassert the arguments raised in the "Supreme/Thompson Motion for Judgment of Acquittal Under Rule 29'[fn22] [Doc. # 23:3] and the Motion by Therm-All/Smigel for Judgment of Acquittal Based on Conflation of Conspiracies and Lack of Venue [Doc. # 245]. The Court ruled orally on each of these motions and the rulings will not be repeated in detail here. The Court reties on its oral rulings, which it merely summarizes below.

(a) Supreme: Supreme argues that the evidence was insufficient to convict because the proof against Supreme boiled down to Thompson's faxing Supreme's price guides (in final form) to Mizell on two occasions, Thompson's receipt of Mizell's price list in March 1995 (after Supreme's price sheets had been issued publicly), and a tiny percentage of sales by Supreme at prices on the price sheets for the volumes involved. Supreme argues that this evidence amounts to Rhodes' efforts to recruit Thompson and Supreme to the conspiracy, but is not evidence of Supreme's active participation in the scheme. Supreme argues that the higher prices for metal building insulation products were required by the cost increases it experienced, and that the phone calls between Thompson and other conspirators were equally consistent

with legitimate trade association matters as with participation in the conspiracy.

The Court has addressed these arguments above and at the time of trial. In substance, these contentions go to the weight of the testimony given by the witnesses, Supreme fails to meaningfully address the testimony of Supreme's former employees, Miranda and Welty, whose testimony about management requiring that they use the price sheets supports the inference that these witnesses believed, and that the jury could find, that Supreme was participating in an agreement on prices. Supreme also does not address the fact that allocation ended in mid-1994 in California, and in or about late 1994 elsewhere. If the unchecked competition existed, and 1993 were any guide, the prices of metal building insulation would have varied substantially and likely dropped overall after allocation. The arguments by Supreme go to the weight of the evidence, and are not appropriate bases for granting a judgment of acquittals

(b) Therm-All (Absence of Single, Nationwide Conspiracy): Therm-All and Smigel argued at trial that the Government failed to prove a single, nationwide conspiracy, as alleged in the indictment. Post-trial, Therm-All again asserts that the evidence was insufficient to prove a national conspiracy and that instead the proof showed "at least two separate alleged conspiracies, with separate origins and separate objectives - only one of which implicated Therm-All." [fn23] The Court rejects this argument, as it did at trial. The issue of whether there were multiple conspiracies or merely a single conspiracy was for the jury, see, e.g., Pena-Rodriguez, 110 F. 3d at 1126; United States v. Guerra-Marez, 928 F.2d 665, 671-72 (5th Cir. 1991), and the issue was properly presented to the jury in this case," Therm-All relied on evidence that the initiation of the

conspiracy in each region was separate from other regions, that there was no common final for the different regional conspiracies, that the nature of the alleged scheme required no cooperation among competitors in different regions, and that there were only two overlapping participants, Rhodes and Maloof. The jury and the Court rejected Therm-All's arguments at trial and the Court again does so. The multiple conspiracies argument by Defendants presented a fact issue for the jury. An executive or top salesperson within each of the conspirator companies made these decisions, including participation in the conspiracy. Defendants Smigel and Thompson made decisions for their companies country-wide. There is no evidence that pricing or sales of metal building insulation were done differently among offices of Defendants. While various companies had different price lists for different regions of the country, there is evidence that conspirators, such as Mizell, Bay, Brite, Therm-All and Supreme, implemented the scheme in all their offices. Conspirators Maloof and Rhodes had nationwide responsibilities and communicated the same or similar requests and. information with other conspirators in numerous regions. Transmissions of price sheets among competitors and entries on the Government's telephone logs showing repeated and sometimes lengthy communications among the conspirators are not limited by region. In substance, the evidence supports the inference that the conspiracy operated in a manner indicating a coordinated scheme across the country to raise and maintain metal building insulation prices in 1994 and 1995.[fn 25]

Therm-All also seems to imply that because Smigel and Therm-All did not know the scope of the conspiracy, it could not have been a member of that conspiracy. This argument is without merit. "The government does not

have to prove that the defendant knew all of the details of the unlawful enterprise or the number or identities of all of the co-conspirators, as long as there is evidence from which the jury could reasonably infer that the defendant knowingly participated in some manner in the overall objective of the conspiracy." United States v. Posadas-Rios, 158 F. 3d 832, 858th (5th Cir. 1998) (quoting United States v. Fernandez-Roque,703 F. 2d 808, 814-815 (5th Cir.1983)); United States v. Castro, 89 F.3d 1443,1451 (11th Cir, 1996) ("the government does not need to prove that each conspirator agreed with every other conspirator, knew his fellow conspirators, was aware of all of the details of the conspiracy, or contemplated participating in the sane related crime") (quoting United States v. Pepe, 747 2d 632,659-60 (11th Cir. 1994)). Thus, Therm-All's argument that it did not have any connection or knowledge of the conspirators or their activities in other region of the country is not dispositive of the issue of Therm-All's legal responsibility as a member of the conspiracy, Therm-All's argument that the evidence is insufficient to establish that there was more than on conspiracy is without merit.

Defendants' arguments as to insufficiency of the evidence are basically attacks on the weight of the Government's evidence in light of Defendants' competing explanations, The Court holds that there is sufficient direct and circumstantial evidence to support the guilty verdicts of Defendants Theme-All and Supreme. A reasonable jury could have found that the Government established guilt beyond a reasonable doubt of Therm-All and Supreme. It was the jury's province to choose among reasonable constructions of the direct and circumstantial evidence. Therm-All's and Supreme's motions for Judgment of acquittal based on insufficient evidence are denied.

Statute of Limitation Arguments

Defendants urge the entry of judgments of acquittal are the grounds that the conspiracy charge against them is time-barred. The five year limitations period of 19 U.S.C. § 3282 applies in this case.[fn26] Defendants initially suggest that the limitations period as to a conspirator commences on the day of his, her or its own last overt act.[fn27] This theory does not comport with prevailing law and is rejected. Sherman Act conspiracy "is a partnership in crime that continues until all of the objectives have been accomplished or abandoned." United States v. All-Star Industries, 962 F. 2d 465, 477 (5th Cir. 1992) (citing United States v Kissel, 218 U.S. 601, 607-08 (1910)) A. conspirator is liable for the acts of the conspiracy unless he affirmatively withdraws from the conspiracy. United States v. Mann, 161 F. 3d 840, 859-60 (5th Cir. 1998); United States v. Chaney, 964 F.2d 437,453 (5th Cir. 1992); Huff v. United States 192 F. 2d 911, 915 (5th Cir. 1951).

Defendants next contend that there is insufficient evidence in the record try prove beyond a reasonable doubt that the conspiracy continued after May 1, 1995. The Court disagrees, as did the jury. While the bulk of the acts in furtherance of the conspiracy occurred in 1994, the evidence is sufficient for the Jury to have found that the charged conspiracy continued beyond May 1995. As explained by the Eleventh Circuit in United States v. Dynalectric Co, discussing-the Fourth Circuit's seminal criminal antitrust conspiracy case, United States v. A- A-A Electrical Co., 788 F. 2d 242, 245 (4th Cir.1986) a "criminal conspiracy to restrain trade should be treated the same as any other criminal conspiracy for purposes of determining the limitation period." Dynalectric Co., 859 F.2d 1559, 1565 (11th Cir.1988) (citing A-A-A, 788 F. 2d at

245).

The Fourth and Eleventh Circuits thus have "recognized that a § 1 Sherman Act violation can occur without any overt act, and hence that a party may suffer `legally cognizable harm' before any overt acts took place. However, these circuit courts emphasized that, as with any criminal conspiracy, the relevant date in the statute of limitations analysis is the date on which the last overt act in furtherance of the conspiracy is made, not the date on which a party suffers `legally cognizable harm." Id. (citing A-A-A, 788 F.2d at 245). Thus, this Court will examine whether any overt acts by any conspirator took place within the limitations period.

The jury was instructed that it could not find a Defendant guilty on the conspiracy charge in the indictment unless the jury found that the conspiracy continued after May 31, 1995. [fn28] Additionally, the jury received a description of the facts required for the Government to prove that the conspiracy continued after May 31, 1995." The Court maintains that these instructions were an accurate statement of the law. See United States v. Kissel, 218 U.S. 601,610 (19l0); accord Grunewald v. United States, 35 U.S. 391, 397 (1957); Dynalectric Co., 859 F. 2d at 1563-64 & n.9[fn29]; Mann, 161 F. 3d at 857; Chaney, 964 F. 2d at 453; Huff v. United States, 192 F. 2d at 915.

To determine the extent to which conspiracy continues over time, the Court must determine the objectives of the conspiracy Dynaelectric Co., 859 F. 2d at 1563-64 (citing Kissel, 218 U.S. at 610). A criminal conspiracy continues in time beyond the initial conspiratorial agreement "until the objectives of the conspiracy either are abandoned or succeed." Id. Only then may one conduct an assessment of what acts may have been in furtherance of that conspiracy. Id, at 1563-64

(citing Grunewald, 353 U.S., at 397). Referring to Kissel, the Dynaelctric court stated that "one the objects of the conspiracy succeed or are abandoned, "the mere continuance of the result of [the] crime does of continue the crime .... for purposes of the statute of limitation." Id. at 1563 (citing Kissel, 218 U.S. at 607) (internal brackets and omissions in original). See also United States v. Northern Improvement Co., 814 F.2d 540, 542 (8th Cir.1987).

"A Sherman Act conspiracy is partnership in crime that continues until all of its objectives have been accomplished or abandoned." All-Star Indus., 962 F. 2d at 477 (citing Kissel, 218 U.S. at 607-08) (bid rigging case). In antitrust conspiracies, "the limits of a conspiracy to restrain trade depend on what the conspirators agreed to do,"Dynalectric Co., 859 F. 2d at 1563 More specifically, the "relevant contours of a conspiratorial agreement in any given case are those charged in the indictment." Id. at 1564 (numerous citations omitted).[fn30] "[All] acts which are part of an illegal conspiracy do not themselves have to be illegal," Id, at 1565 n.9 (numerous citations omitted)," Contrary to Defendants' arguments, the purposes of the conspiracy alleged in the indictment and proven at trial extended into the limitations period. In addition, in certain contexts, receipt of the financial gains from an illegal agreement, although not necessary elements of a criminal antitrust conspiracy to restrain trade, may constitute overt acts made in furtherance of the conspiracy because each illicit transaction is a separate, individual act!. See United States v. Chard, 744 F, 2d170, 172-73 (5th Cir.1984); United States v. Helmic , 704 F. 2d 547, 549 (11th Cir.1983); United States v Mennuti, 679 F. 2d 1032) 1035 (2d Cir. 1982) (and cases cited therein).

"A member of a conspiracy continues to be responsible for acts committed by co-conspirators even

after the former's arrest unless he has withdrawn," Id.; see also Grunewald, 353 U.S. at 396-97; United States v. Manges,110 F.3d 1162, 1169 (5th Cir. 1997) (explaining that "the government must prove a conspirator committed an overt act in furtherance of the conspiracy in the five years before the indictment") (emphasis added), Thus, any of the co-conspirators, not just the defendant, can continue the conspiracy. "Before the statute runs out the individual remains liable for his own criminal acts, and also for the acts of his co-conspirators, including those acts occurring after the individual's own last overt act in furtherance of the conspiracy," In re Corrugated Container Antitrust Litigation, 662 F. 2d 875, 886 (D.C. Cir. 1981).

The indictment before the Court charges that Defendants "agreed to raise, fix and maintain paces for metal building insulation certain regions of the United States", "discussed prices to be charged for metal building insulation in certain regions of the United States"; "raised, fixed and maintained prices for metal building insulation in certain regions of the United States;" and "monitored and enforced compliance with the agreement to raise, fix and maintain prices for metal building insulation its certain regions of the United States." Indictment, Par. 10. Defendants' predominant statute of limitations argument is that there were no overt acts or other evidence that the conspiracy continued into the limitations period (i.e., after May 31, 1995) This argument lacks merit when all inferences from the evidence of record are drawn in favor of the verdict.[fn31] One basis for Defendants' contention that the conspiracy had succeeded or been completed before May 31, 1995, is that the essence of the Sherman Act § 1 violation is the agreement to violate that law, and once that agreement is made, the crime is complete, and the limitations period should commence. This argument ignores the distinction between a conspiracy to restrain

trade and a contract in restraint of trade. See Dynalectric, 859 F. 2d at 1569 . As Justice Holmes stated in Kissel, "[a] conspiracy in restraint of trade is different from and more than a contract in restraint of trade. 218 U.S. at 6-8 (cited in Dynalectric, 859 F.2d at 1569). Thus, there is no merit to Defendants' argument that the time the Defendants or others initially created the unlawful agreement is the time the statute of limitations commences.

Since Defendants are liable for acts of co-conspirators, the Court must look at the evidence of conduct by all conspirators, even if Defendants did not perform the actions themselves. The Government adduced sufficient evidence for the Jury to find that the charged conspiracy continued past May 31, 1995, into the limitations period, There was the direct evidence from Rhodes and Janne Smith (of Bay Star) that the conspiracy continued until subpoenas were served in June 1995. The Government's circumstantial proof permits the reasonable inference that Defendants' December 15, 1994 price sheets remained in, effect past May 31, 1995. Indeed, there is no evidence that price lists with lower prices were issued formally or informally by Defendants or any other conspirator. Thus, the jury had circumstantial evidence from which to find, as the Government argued, that the conspiracy to agree on, and maintain the artificially high prices continued into June 1995 The Government also adduced proof permitting the inference that Mark Engebretson of Therm-All and. Roger Ferry of CGI had pricing discussions in furtherance of the conspiracy, and. that these conversation continued into Jun 1995. Engebretson admitted that he faxed pricing information to Ferry in June 1995[fn32]and the Jury was entitled to infer that this transmittal was part of Therm-All's efforts to monitor or enforce the prices to which the competitors agreed - in

furtherance of the conspiracy - as the Government argued.[fn33] Furthermore, despite the end of allocation, a reasonable jury could have found that in June 1995 the conspirators had not completed all the objects of the conspiracy, which included maintaining prices at higher levels than would have likely resulted from open competition and enforcement of these prices.[fn34] Indeed, there is no evidence that any conspirator abandoned the purposes of the conspiracy prig to receiving the Government's June 1995 subpoenas,, Finally, the jury was instructed that they could not find Defendants guilty of the conspiracy charged in the indictment unless the jury found that conspirators had engaged in overt acts in June 1995.[fn35] Presumably, the jury followed this instruction.

Viewing all the evidence in the light most favorable to the verdict, a reasonable and rational jury could have found beyond a reasonable doubt that Defendants Therm-All and Supreme were guilty of a conspiracy to raise, fix and maintain prices, and agreed further to enforce this conspiracy, which conspiracy continued during some portion of the five-year period immediately preceding the indictment. Thus, Defendants' argument that the charge is barred by the statute of limitations is without merit, and Defendants' Motions for acquittal on this ground must be denied.

II. MOTIONS FOR NEW TRIAL

Defendants seek a new trial in this case pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Defendants assert various grounds for this relief. The Government opposes these requests. Defendants' arguments will be taken in turn, but are not given detailed analysis because most if not all were ruled on

during trial.

A. General Standard for New Trials

The trial judge is to grant a new trial under Federal Rule of Criminal Procedure Rule 33 only if required in the interests of Justice. See Fed. R. Crim P. 33. As interpreted in this Circuit, a new trial should be granted only if there is error that is not harmless. See United States v. Munoz, 150 F.3d 401, 41 (5th Cir. 1998) (citing United States v. Rasco, 123 F. 3d 222, United States at 228 (5th Cir. 1997)); Charles Alan Wright, 3 Federal Practice and Procedure 551(2d ed 1982). One panel of the Fifth Circuit has stated that the trial judge may weigh the evidence and assess credibility of the witnesses in reviewing a motion for a new trial, see United States v. Robertson, 110 F. 3d 1113, 1117 (5th Cir. 1997), but this rule is limited. Cf. United States v. Schnitzer,145 2d 721, 731 (5th Cir. 1998). The trial court must refrain from re-weighing the evidence and setting aside the verdict simply because she feels some other result would be more reasonable., See Munoz, 150 F.3d at 413 (citing Robertson, 110 F.3d at 1118). Also, the trial judge may grant a new trial only if she finds that the evidence preponderates heavily against the verdict, such that it would he a miscarriage of justice to let the verdict stand. Id.

B. Analysis of Defendants' New Trial Arguments

Contra to the Weight of the Evidence.-Defendants each seek a new trial claiming that the conviction is against the weight of the evidence" This argument is rejected. The record contains sufficient probative

evidence that Defendants knowingly participated in the conspiracy charged in the indictment, and the conspiracy continued within the limitation period, a summarized above in connection with Defendants' motions for judgment of acquittal.[fn36] It does not contravene the interests of justice to allow these convictions to stand. Even though the Court is permitted to weigh the evidence and assess the credibility of the witnesses in considering a motion far new trial, and the Court has done so, to the extent permitted, the Court remains unpersuaded that entering judgment on these verdicts works a miscarriage of justice. The Court declines to alter to verdict of a duly constituted jury that was presented with the same arguments Defendants now proffer about the proper inferences to be drawn from the evidence and the credibility of the witnesses.

Jury Instructions.-Defendant Supreme argues that the Court's jury instructions were confusing as to the level of intent necessary to support a verdict of guilty.[fn37] In its Reply, Supreme recasts its argument to be that the Court erred because it failed to explain how the could consider evidence of competitive pricing.[fn38] Therm-All adopts these arguments. The Court denies Defendants' motions for a new trial on the basis of improper jury instructions. The Court's instructions substantively covered standard Fifth Circuit law on criminal conspiracies in general; explanation. of antitrust law about per se violations of § 1 of the Sherman Act; the required elements for proof of a criminal Sherman Act § 1 violation; and a detailed explanation about each of the elements of the crime charged, including the intent element and related legal principles. The Court included language requested by both the Government and Defendants as to proof that is sufficient or insufficient to establish the necessary intent, Defendants do not identify

proposition of law that the Court's instructions explained erroneously.[fn39]

Defendants contend that the Court also should have given an instruction as to how competitive pricing"'could be considered as favorable to the defense."[fn40] The Court concludes that its jury instructions, when read as a whole, properly explained the necessary law and were sufficiently complete. Defendants' requested instruction that their pricing policies could be considered as evidence of competitive behavior was basically a request for continent by the Court on the evidence, a practice the court of appeals discourages. Defendants were given freedom to introduce any and all evidence of their pricing practices and sales, as well as evidence through economic expert witnesses. Nothing the Court included in its instructions prevented the jury from considering Defendants' factual arguments that the sales they actually made were inconsistent with their having entered into any price fixing agreement.

The Court therefore adheres to its earlier rulings on the correctness of the charge as given to the jury. This ground for a new trial is without merit.

Evidentiary Rulings.-Both Defendants contend that the Court made various incorrect evidentiary rulings,, The Court adheres to its prior rulings and concludes that none of the evidentiary points have merit.

Supreme contends that the Court should not have permitted Rhodes' plea agreement into evidence. The Court rejects this argument,, The plea agreement was received because Supreme and Therm-All both made repeated and lengthy challenges to Rhodes' credibility and his motives to testify favorably to the Government. Appropriate limiting instructions were given to the jury at the time the plea agreement was offered and at the end of the case.[fn41] There was no error in this evidentiary

ruling. See United States v. Valuck, 286 F.3d 221, 228-29 (5th Cir. 2002).

Supreme also complains that it was not permitted to introduce evidence (through an expert or through other means) about potential sentences of incarceration that Rhodes might face if an obstruction of justice enhancement under the United States Sentencing Guidelines were applied. The Court held under Rule 403 of the Federal Rules of Evidence that this evidence was speculative, confusing, and a waste of time, and concluded that these concerns substantially outweighed the minimal probative value of the proffered evidence.The record does contain evidence that at the time of trial Rhodes fared approximately two years imprisonment if convicted of the conspiracy with which he had been charged in the absence of a downward departure for his substantial assistance to the Government. Defendants were given fall opportunity to cross-examine Rhodes an his understanding of how the plea agreement provisions worked. Defendants also elicited testimony from Leif Nilsen that Rhodes had said that he would do whatever it takes to earn the departure. There was ample evidence in the recant of Rhodes' potential bias in favor of the Government. The exclusion of Defendants' proposed sentencing options was well within this Court's discretion.

Therm-All complains, as to evidentiary errors by the Court, about the Government's questioning of Mark Engebretson (a Therm-All employee) about communications with competitors, API and BSIS, who were not listed as conspirators by the Government. Therm-All contends that this evidence was prejudicial and a violation of the Federal Rule of Evidence 404(b) prohibition of other acts to show that Defendant acted '"in conformity therewith' relative to the matters which were properly at issue under the indictment."[fn42] Therm-All

argues that this evidence was otherwise irrelevant because it reflects only "unilateral communication of pricing information" by Therm-All, and Engebretson's testimony was consistent with his grand jury testimony. In response, the Government correctly suggests that this testimony was relevant and admitted for the purpose of impeaching the credibility of Engebretson, who remained an employee of Therm-All through the trial and denied any knowledge of price fixing, despite repeated communications with competitors. The testimony was admitted only after Engebretson denied several matters that were contradictory to testimony by other witnesses and contrary to reasonable inferences from same of the other records in evidence,, In fact, the testimony of which Therm-All complains was not particularly harmful; this evidence demonstrated that Engebretson communicated with various competitors which. the Government conceded were not conspirators, thereby corroborating Engebretson's contention that his communications with conspirators were not in furtherance of the conspiracy, but were for other purposes. Therm-All's contention that this evidence was erroneously admitted is rejected.

Therm-All also complains about the Court's admission of GX200, a draft Therm-All price sheet relating to the third price increase in December 1994. These arguments are frivolous and are rejected. Therm-All's president, Smigel, recognized the document as draft of the December 15, 1994 Therm-All price sheet. Any objections to the document properly relate to the weight to which it was entitled and not its admissibility. The fact that the Government telephone summary (GX 10E) does not contain an entry that corresponds to the transmission from Therm-All' offices (or Smigel's or Engebretson's borne) based on the fax {header or otherwise was a matter for the Jury's consideration, not the admissibility

of the evidence.

Therm-All also objects to the admission of Engebretson's invocation of his Fifth Amendment privilege against self-incrimination and the Government's granting him immunity. Therm-All's cross-examination of Engebretson opened the door to these matters. Thus, the objection is overruled, Further, Therm-All's arguments that this evidence was particularly prejudicial are unfounded.[fn 43] The Jury was entitled to know the context in which Engebretson testified under all the circumstances of this case and his testimony of record.

Therm-All further argues that the Court erroneously denied admission of Therm-All's offer of the Government's Bill of particulars in United States v, Maloof, Criminal Case No. H-97-093 (S.D. Tex., Houston Div.), dated June 20, 1997. The Court reaffirms its evidentiary ruling. A prosecutor's statement in an earlier case is in a later case unless that statement is clearly inconsistent with the Government's position the later case.

United States v. DeLoach, 34 F.3d 1001,1006 (11th Cir. 1994). Further, even if technically admissible, the evidence must also be relevant, FED,, R. Ev. 402, and must have probative value that outweighs the danger of unfair prejudice, confusion of the issues, misleading the jury, or potential for undue waste of time. Fed. R. Ev. 403. In the absence of a truly contradictory position in an earlier proceeding by the Government, there was no relevance in this case of the Government's theories against Maloof in the previous case See Wilson v. Bradlee's of New England, Inc., 250 F.3d 10, 16-17 (1st Cir. 2001).

Maloof was charged with participation in a Texas conspiracy "in violation of" the antitrust laws through a price fixing scheme. The Texas conspiracy was a subset of

the nationwide conspiracy charged in this case. Thus, the prerequisite of an inconsistent position by the Government is not met in. this case. In the Maloof case, the first criminal trial involving the metal building insulation conspiracy, the Government made a valid prosecutorial decision to limit the theory and evidence to acts pertaining to the Texas market. However, that prosecutorial strategy decision does not mean that there was not a broader conspiracy of which the Texas transactions were a part.[fn 44] Thus, the Maloof pleading from the earlier criminal case was not relevant. In any event, admission of that document would have been a colossal waste of time and would have been the source of confusion for the jury. See Fed. R. Ev. 403

Alleged Variances Between Indictment and Evidence.-Supreme contends that there were material variances between the charge in the indictment, as explained by the Government in pretrial conferences and in its Bill of Particulars, and in the proof and theories the Government articulated at trial., The Court finds that these distinctions do not form viable bases for granting a new trial.

When a new trial is sought on the bans of a variance between the evidence at trial and the indictment, reversible error does not exist unless the variance prejudices the defendant's substantial rights. See, e.g. United States v. Guerra-Marez,, 928 F2d 665, 671 (5th Cir. 1991). To the extent Supreme seeks a new trial on this basis in the exercise of the Court's discretion, Supreme must demonstrate that there has been a miscarriage of Justice from the variations of which it complain.

Under Rule 7(f) of the Federal Rules of Criminal Procedure, the court "may direct the filing of a bill of particulars.' A bill of particulars is granted only where

necessary to inform the accused of the charge against him with sufficient precision to enable him to prepare his defense, to avoid or minimize the danger of surprise at trial, or to enable him to plead his acquittal or conviction in bar of further prosecution for the same offense. Wong Tai v. United States, 273 U.S. 77, 82 (1927); United States v. Montemayor, 703 F. 2d 109, 118 (5th Cir. 1983); United States v. Haas, 583 F. 2d 216 (5th Cir. 1978). [fn45] A bill of particulars is not an investigative vehicle for the defense and is not available as a tool to obtain detailed disclosure of the government's evidence before trial. United States v. Kilrain, 566 F. 2d 979, 985 (5th Cir.1978). In general, an inquiry into the government's legal or evidentiary theory as to the means by which a defendant committed a specific criminal act is not a proper purpose for a bill of particulars. James C. Cissell, Federal Criminal Trials (1992) Sec. 701.

As a preliminary matter, Supreme cites no authority for its premise that pretrial statements by the Government generally elaborating its trial theories in response to defense requests in a complex case for more particularized information about the Government's theory of its case definitively limits all the evidence and arguments that the Government may make at trial. The valid concern raised by Supreme's arguments is whether there was genuine surprise and material prejudice to Supreme from a lack of pretrial understanding of the full scope of the Government's evidence and theory against it. The Court concludes that no such surprise or prejudice has been shown by Supreme.

The indictment in this case was adequately specific as to the general nature of the alleged unlawful agreement by Defendants. The indictment alleged there was an agreement to raise, fix and maintain prices of metal building insulation, and to enforce these prices. The

lead prosecutor (Mr. Rosman) stated on the record at a pretrial conference, in response to the defense's renewed requests for additional particulars (after the Government had provided written response to Defendants' original motion[fn46]): "Our theory was that the aim and the object of this conspiracy was simple and it was to make more money, How did they do it? They fixed prices. How did they fix prices? By exchanging price sheets sometimes, by discussing prices, by policing each other to make sure nobody dropped the prices. There you have it."[fn47] The government also correctly pointed out (at this and other conferences) that the theories were the same as in the trials in related cases (against Mark Maloof and Danny Fong[fn48]), for which defense counsel had the transcripts or had observed the trial.[fn49] Supreme first complains about the Government's introduction of evidence on a specific transaction known as "Rib Roof," a project on which both Supreme and Mizell bid in early 1994. Supreme contends that this evidence was outside the Government's theory because alleged oral communications were about prices being bid by the competitors on a single transaction, not general price sheet prices, and because the project was not governed by a published price sheet.

The Court declines to grant a new trial on this basis. The Government's primary theory was that beginning in early 1994, if not late 1993, the competitors communicated their intentions to raise prices and agreement to use certain prices as reflected on published price sheets. The Government consistently acknowledged in pretrial conferences and during trial that competitors' sales to their larger customers were priced differently from (and generally lower than) the conspirators' published prices to smaller purchasers.[fn50] The Rib Roof testimony demonstrated that Mizell (through

Rhodes) and Supreme (through Thompson or her subordinate), despite being competitors, were communicating with each other about pricing on a specific deal. This evidence, when viewed in the light most favorable to the Government, was pertinent even under a narrow construction of the Government's theory of its case. The testimony and documents were circumstantial corroboration of the Government's position that, at least as of early 1994, Supreme communicated actively with a competitor about prices to be charged. This evidence tended to impeach the defense witnesses who stated that they did not discuss prices on specific deals or coordinate their pricing policies.

Second, Supreme's argument fails because there is no legitimate issue of surprise stemming from this evidence. The Government had produced the pertinent documents in discovery and Defendants were in possession of testimony about this transaction from the Maloof trial transcript, if not Rhodes' grand jury testimony[fn 51] Most importantly, the prosecutor stated on the record at a pretrial conference, in response to the defense's requests for additional particulars after the Government had provided written response to Defendants' motion, [fn 52] "Our theory was that the aim and the object of this conspiracy was simple and it was to make more money. How did they do it? They fixed prices. How did they fix prices? By exchanging price sheets sometimes, by discussing prices, by policing each other to make sure nobody dropped the prices. There you have it."[fn53] The Government also correctly pointed out (at this and other conferences) that the theories were the same as in the trials (in related cases that defense counsel had observed or obtained the transcripts.[fn 54]

Supreme also argues that the Government's theory of what sales were "on" and "off' the published price

guides shifted materially during trial, to the prejudice of Defendants. The Government's original argument pretrial and in its opening statement was that a sale of metal building insulation at any price less than the price on the published price sheet for the volume actually purchased was "of the price list and was a violation of the conspirators' agreement, even if the price used was on the sheet for a larger volume of the product. Thus, the government's position appeared originally to be that "jumping a bracket" (i.e., charging a lower price on the published sheet designated for larger quantities) was a violation of the agreement. Some of Rhodes' testimony supports this interpretation of the conspirators' agreement.[fn55] At trial, Defendants repeatedly argued that the vast majority of their sales were "off' the price lists and thus Defendants' actual sales demonstrated that Defendants had not made any agreement to fix prices and were not members of the conspiracy. By the end of the trial, the Government also contended that the conspirators implicitly agreed not to complain if a competitor jumped a bracket. Also, in response to the defense's statistical data on their sales in 1994, the Government argued that even sales that were "off' the price lists were at prices materially higher than Defendants previously had obtained, and thus these sales were evidence of Defendants' participation in the unlawful agreement.

The Court cannot conclude that the Government's arguments were improper. The Government's pretrial explanation of the methodology of the conspiracy was broad enough to encompass its ultimate arguments, even though these later arguments went beyond the original description of the unlawful agreement given by the Government's witnesses, Rhodes and Smith. Defendants' contentions relate to the weight of the Government's

evidence. Neither the indictment, nor the pretrial or early trial explanation by the Government of its theories, precluded the prosecution from asserting the arguments the defense now criticizes, The Government was entitled to respond to Defendants' contentions and evidence adduced at trial. It is typical for a party, even the Government, to expand its arguments in an attempt to argue implications of the evidence from that party's own perspective, even if it is necessary to go beyond the party's original description of the case. The Government's theme nevertheless was consistent; Defendants and others entered into an agreement to raise and fix prices, and to enforce the agreement.

Defendants were not unfairly prejudiced by this aspect of the Government's conduct. The complexities of this case arise in substantial part from the intricate commercial nature of the criminal violation charged and the voluminous evidence presented by the parties, Defendants were permitted to argue the defects and inconsistencies in the Government's theory and evidence. Defendants reminded the jury repeatedly that the Government's theories had changed during the trial that the Government's witnesses' testimony had shifted, and thus the Government's position was meritless. It was up to the jury to decide the weight of the evidence and arguments, and to assess the credibility of the witnesses. The Court finds no miscarriage of justice from the evidence introduced or the arguments by the Government at trial.[fn56] Defendants have not demonstrated that there were meaningful or prejudicial variances between the Government's initial theory and. its positions at trial. Any disparities do not warrant a new trial.

Prosecutorial Misconduct: 'Closing Argument Allegedly Outside the Record

Supreme criticizes the Government's rebuttal closing argument concerning testimony by Jim Miranda, a witness called by the Government,, Supreme also complains about a comment that Rhodes pleaded guilty to a "nationwide" conspiracy. Supreme contends that these arguments were merely used by the Government to bolster its witnesses' testimony and that these arguments constituted prosecutorial misconduct.

The Court has considered these contentions and concludes that there was no error by the prosecution in its closing argument. Even if there were error, the Court exercises its discretion to deny the new trial motion grounded on the prosecution's continents during closing argument. United States v. Jefferson, 258 F. 3d 405, 412 (5th Cir. 2001) (citing United States v. Thomas, 120 F.3d 564, 573-74 (5th Cir. 1997)). "In assessing error based on prosecutorial misconduct [the Court is to consider the following factors: '1) the magnitude of the statements prejudice, 2) the effect of any cautionary instructions given, and 3) the strength of the evidence of defendants guilt,"' United States v. McWaine, 243 F.3d 871, 873 (5th Cir. 2001) (quoting United States v. Tomblin, 46 F. 3d 1369, 1389 (5th Cir. 1995)). See also Styron v. Johnson, 262 F.3d 438, 449 (5th Cir. 2001).

(a) Rhodes' Plea Agreement: The prosecutors' comments referring to the grand jury were in direct response to argument by defense counsel. As to Rhodes' plea agreement, there was no misconduct. The plea agreement was in evidence.[fn57] The defense extensively cross-examined Rhodes about the bias that specific terms in the agreement may have engendered. There was no error here.

(b) References to Grand Jury Testimony: As to Supreme's complaints about references by the

Government to Miranda's grand jury testimony, the Court believes that the argument was fair comment in fight of Supreme's having confronted Miranda with alleged prior inconsistent statements from his grand jury testimony, and his attempt to explain the discrepancies to the jury. The Government was entitled to refer generally to Miranda's grand jury testimony To the extent Supreme implied in closing that Miranda"s recollection was more fresh, and thus his testimony was more accurate, in the grand jury than at trial, the defense strenuously attacked Miranda's credibility. The Government had a right to respond within the record. To the extent the Government's continents arguably referred to matters outside the trial record, the Court now finds that there was no prejudice from any error the Government may have made. There were many hours of closing argument after an extended trial. This argument by the Government was a minor one in context. In any event, the Court instructed the jury that it may consider only the evidence before them, that attorneys' arguments are not evidence, and that the jurors' own recollection of the evidence must govern their deliberations. These instructions cured any error that may have existed,, Finally, there was more than sufficient evidence to support the guilty verdict of Supreme irrespective of this argument. Supreme's motion for new trial on the basis of prosecutorial misconduct is denied.

Supreme also asserts that the Government improperly argued in closing that Rhodes' trial testimony was consistent with his grand jury testimony. This argument is rejected for the sane reasons that the Court rejects Supreme's complaints about the Government's reference to Miranda's grand jury testimony. The reference to Rhodes' grand jury testimony was at most a passing comment that was likely understood. by the jury

as a response to the various instances by Defendants to impeach Rhodes with prior inconsistent statements from his grand jury testimony. In any event, there was no prejudice to Supreme from the prosecutor's comment. Finally, the Court's general instructions for the juror to decide the case on the basis of the evidence and only the evidence sufficed to prevent any need for a new final on this basis.

(c) Arguments On Certain Therm-All Price Sheets (GX 200 and 5); Therm-All contends that the Government's closing argument was improper with respect to GX 200, which the Government contends was a draft Therm-All price sheet that "got into Wally Rhodes' price book" Therm-All contends that this was one of only two documents supporting the Government's theory that Therm-All communicated its price sheets to competitors prior to announcement of the price increases to the market. Therm-All argues further that it was prejudiced by the Government's insistence that the sheet wound up in the Mizell files. Therm-All concedes that Rhodes testified to various conversations with Smigel about prices, but contends that these alleged communications lacked documentary support in the record other than possibly GX 200. The Government correctly responds that the GX 200 was received in evidence, and the Court required only that the Mizell bates number be removed.[fn58]

The Court concludes that the government's argument was not prejudicial error. The characterization of the document as a draft Therm-All price sheet was a permissible inference from the obvious similarities in style and contents to undisputed Therm-All price sheets. Indeed, Smigel eventually admitted this characterization of the document. The Court did not require deletion of the

Therm-All fax header suggesting that the document had been faxed from Therm-All at some point, possibly on September 24, 1994. While Therm-All argued that the time of day on the fax header was inconsistent with other testimony, the Government was entitled to ague that a reasonable inference from the document as received in evidence was that Therm-All had publicized its draft prices in furtherance of the conspiracy in September 1994, right after the fiberglass manufacturers announced their price increase set for mid-December 1994, and just before the metal building insulation companies were to meet at a trade association meeting.[fn59] See generally United States v. Machuca-Barrera, 261 F. 3d 425, 435 (5th Cir. 2001). Defendant had the opportunity to point out the weaknesses in the proof, and did so at length.

Finally, the Government's assertion in rebuttal that the sheet was in Mizell's files was supported by Rhodes' testimony. Even if it was argument of facts outside the record, the error was insignificant in light of the rest of the substantial record against Therm-All. The Court repeatedly admonished the jury that counsel's arguments were not evidence and that the jurors must decide the case on the evidence as they recalled it.

Therm-All also contends that the Government improperly argued facts not in evidence regarding GX5. That document was a draft Therm-All price sheet bearing the printed date of December 15, 1994 on the top of the first page. The date "July 15, 1994" was printed in text at the bottom of the second page, but there is a handwritten correction changing the month to "December." The document bears a bates stamp indicating it was produced (in response to the Government's subpoena) from the files of CGI, a competitor of Therm-All in the Northeast. The Government argues that this document was a draft for Therm-All's third price increase. The document contained

handwritten markings by Dennis Kaczmarek, a Vice President of Therm-All during the conspiracy period. Therm-All complaints that the Government, in rebuttal argument, repeated Smigel's testimony on cross-examination denying any knowledge that this document had been "hand[ed] off '- to CGI. The Government's argument amounted to the contention that this testimony was incredible, and that there was circumstantial evidence that the draft price sheet had been given to CGI at a metal building insulation convention in the Fall of 1994. Therm-All points out correctly that there was no evidence that Kaczmarek handed the document to anyone at any time, and contends that this argument was prosecutorial misconduct that should have been sanctioned though the delivery of an instruction proposed by Therm-All. The Court refused to give the specific instruction Therm-All requested[fn60] because the proposed instruction was overbroad and unnecessarily sought the Court's comment on the evidence. The Government was properly allowed to argue far an inference that Kaczmarek, who had worked closely with Smigel, had altered the date on the document (based on the handwritten alteration of the date, which the Government invited the jurors to compare to GX8 8B that contained Kaczmarek signature), The fact that the document was in CGI's files was also uncontroverted in the record. The only potential criticism of the Government's argument was the reference to the manner in which the document may have reached CGI's files. Because Therm-All's proposed instruction addressed more than this isolated issue, the Court deemed Therm-All's instruction to invade the province of the jury.[fn61]." Ultimately, it is likely that the Government's argument that Kaczmarek handed the price list to a CGI representative at a particular meeting in Fall 1994 was

outside the direct evidence of record[fn62] but the harm was minimal and in any event was cured by the Court's instruction. It was within the range of several reasonable inferences that the document reached CGI's files because of conduct by someone from Therm-All. The Court nevertheless reiterated, its instructions that the jurors must rely on their own recollection of the evidence and that arguments of counsel were not evidence. The Court's instruction was sufficient to cure any harm the argument may have caused, Moreover, Therm-All's counsel spent extensive time in closing (prior to the offending comment by the Government) in discrediting and discounting the importance of the document.,

Finally, Therm-All complains in passing about the argument made by the Government in its initial closing that Engebretson talked to his friend Roger Ferry of CGI about pricing, and was exchanging price information by sending Ferry a price sheet, Therm-All's argument that the Government's conduct entitles Therm-All to a new trial is rejected. Engebretson admitted he had conversations with Ferry about pricing on one or more occasions. Engebretson also admitted that Ferry faxed a copy of at least one bid to Engebretson, but denied any other faxes of pricing information The Government was entitled to seek the inference that Engebretson's testimony in regard to pricing conversations and communications was in furtherance of the conspiracy and that his explanations for his conduct were not truthful. To the extent that the Government argued specifically that Engebretson faxed pricing information to Ferry, the error was harmless in light of the balance of the evidence of record.

D. Venue

Therm-All argues that venue was not proper in this district. Therm-All's premise is that there was more than one conspiracy. Therm-All argues that there was a Texas-based agreement and one or more other agreements elsewhere. After denying any involvement at all, Therm-All alternatively contends that its involvement, if any, was centered in regions of the country entirely separate from the Texas conspiracy in which Maloof was involved. This argument is unfounded in light of the substantial evidence demonstrating that there was a national conspiracy in which Therm-All participated, as discussed above.

The venue issue was a fact question. The Court therefore instructed the jury to consider question.[fn63] "[A]ny [criminal] offense begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a); see United States v. Socony- Vacuum Oil Co., 310 U.S., 150 252, 53 (1940); United States v. Pomranz, 43 F.3d 156, 158 (5th Cir. 1995) (venue is proper in a conspiracy case in any district where a overt act was committed in furtherance of the conspiracy); United States v. Winship, 724 F. 2d 1116, 1125 (5th Cir. 1954) (same),

The jury in this case thus was permitted from the evidence to find that venue was proper since there were numerous acts in furtherance of that conspiracy that had taken place here. Therm-All itself need not have committed an act in the Southern District of Texas for venue to be proper here. The evidence is substantial that other conspirators, such as Bay, Bright and Mizell, engaged in acts in furtherance of the conspiracy in this district. The evidence was sufficient to permit the jury to find that there was a single conspiracy. Defendant's

arguments that venue is improper are without merit.

E. Denial of Severance

Therm-All repeats its complaint that it was denied severance from Supreme for trial. This argument is rejected for the reasons stated on. the record pretrial. The Defendants were indicted together[fn64] The general rule is that defendants indicted together should be tried together. Zafiro v. United States, 506 U.S. 534, 537 (1993); United States v. Krout, 66 F.3d 1420 1430 (5th Cir. 1995); United States v. Lee, 744 F.2d 1124, 1126 (5th Cir.1984).[fn65] district court should grant a severance "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from. making a reliable judgment about guilt or innocence." Zafiro, 506 U.S. at 537-41. Indeed, neither a quantitative disparity in the evidence nor the presence of a spillover effect requires a severance. United States v. Neat, 27 F.3d 1035, 1045 (5th Cir.1994). The Supreme Court has declined to adopt a per se severance rule in light of"mutually antagonistic defenses." Zafiro, 506 U, S. at 538-39; United States v. Pettigrew, 77 F. 3d 1500, 1519 (5th Cir.1996). Normally, limiting instructions to the jury will cure any risk of prejudice. Zafiro, 506 U.S., at 540-41.

A defendant is not prejudiced if a Jury can make individual guilt determinations by following the Court's cautionary instructions. Joinder works a certain degree of inherent prejudice, but the case law holds that there must be compelling prejudice in order to justify severance. United States v. Bright, 630 F. 2d 804, 813 (5th Cir.1989). Denial of severance under Rule 14 is within the Court's broad discretion, and is reversible only for abuse of discretion. United States v. DiSimone, 660 F. 2d 532, 539

(5th Cir. Unit B.1981).

The Government had a right to try these Defendants together. Indeed, they were alleged to be part of the same conspiracy and there was material overlapping evidence that made it far more efficient to have a Joint trial. Moreover, the Jury clearly was capable of considering each Defendant separately, as its not-guilty verdicts on the individuals indicates.

IV. CONCLUSION

For the foregoing reasons, the motions filed pursuant to Federal Rules of Criminal Procedure 29 and 3 by Defendants Supreme Insulation, Inc. and Term-All, Inc. lack merit and cannot be granted. The verdict of the jury that considered the extensive evidence of record and the detailed arguments of counsel should stand. It is therefore

ORDERED that Defendant's [Supreme Insulation Inc.,'s] Motion for Acquittal or in the Alternative New Trial, filed pursuant to Federal Rules of Criminal Procedure (c) and 33 [Doc,, # 290] is DENIED. It is further

ORDERED that the Motion Defendant Therm-All, Inc. for Judgment of Acquittal, or for New Trial [Doc. # 295] is DENIED.

Footnotes

fn1 Section I of the Sherman Antitrust Act provides, part, that:

Every contract, combination . . . or conspiracy, in [unreasonable] restraint of trade . . . among the several States . . . is hereby declared to be illegal. . . Every person who shall make any contract or engage in any.

..conspiracy hereby declared to be illegal shall be . ..guilty of a felony [offense against the laws of the United States].

fn2 Mizell's increase became effective on February 1994, and Bay's increase may have become effective on January 17, 1994.

fn3 Supreme issued its first published price sheets in mid-1994. Therm-All previously had published price sheets

fn4 California, apparently allocation ended earlier.

fn5 Testimony is incredible as a matter of law only if relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature. Pena-Rodriguez 110 F 3d 1123 (citing Bermea 30 F.3d at 1552).

fn6 Rhodes also testified that Maloof spoke with Thompson who had agreed to implement a price increase and not jump brackets

fn7 Compare GX 18 (Mizell) with GX 4 (Supreme) (price sheets on second price increase), Also compare as to third increase in December 1994: GX 19 (Supreme) with GX 20 (Mizell (southern region)) and GX 3 (Supreme (California)).

fn8 GX6

fn9 There was a split of opinion among the witnesses as to how often the discounting was permitted In any event, the fact that these employees had to call upper management for permission was a disincentive to discounting, at least at first

fn10 See GX14

fn11 Compare GX1 (Mizell) with GX14 (Therm-All), for 3" VR and 3"PSK-10. See also GX 43C (Bay's Northern price sheet for first increase).

fn12 Compare GX17 (Therm-All) with GX18 (Bay Northern) on 3" white vinyl.

fn13 See GX 25 (' Therm-All price sheet (third price increase));57A, 57D and 57F (telephone messages in Feb. 1995)

fn14 See GX27 (notes); GX 28 (Mizell price sheet).

fn15 See GX 10A,10B,10C, 10D, 10E and 10F,

fn16 See GX 77B (Nov. 1994) and 77A (Dec. 20,1994).

fn17 It is unclear that the conspirators bid against each other on all or even most of the jobs they performed. If they did not bid against each other, it was possible that the conspirator would he unaware of the discounting, in which its competitor was engaged.

fn18 There also was some indication. that the first price increase announcements were not always accompanied by a final price list. That information may have been supplied by Defendants later conspirators' (including Defendants') price sheets in conjunction with other evidence the jury found incriminating.

fn19 Supreme also asserts this argument in another vein in its post-verdict brief and at trial.

fn20 Indeed, Rhodes testified that as a result of the efforts to raise prices in 1993, the prices actually dropped.

fn21 Therm-All made this argument at trial also with respect to Smigel's involvement in the trade association activities, especially in early 1994

fn22 The parties and the docket sheet reflect that this motion was filed on behalf of all Defendants. However, the title of the Motion. contains only Thompson's and Supreme's names.

fn23 Therm-All argues post-trial that the evidence demonstrated that any conspiracy that Therm-All might have joined through Smigel's action with Rhodes was part of an agreement separate from the Texas-used "southern conspiracy" that Therm-All contends was the focus of most of the evidence at trial.

Fn24 To the extent Supreme asserts this argument, the analysis is the same. The issue of whether there was a single conspiracy or more than one was presented to the jury with the following instruction:

Charged.- As to the first element, the government must prove beyond a reasonable doubt that the nationwide conspiracy charged in the indictment was knowingly formed and existed at or about the time alleged, The indictment charges that the defendants and other conspirators entered into a single nationwide conspiracy to raise, fix and maintain prices for metal building insulation in various regions of the United states; and that they monitored and enforced compliance with that agreement.

You therefore must determine whether the government has proven beyond. a reasonable doubt that the single

conspiracy charged in the indictment, that is, a nationwide conspiracy to raise, fix and maintain prices for metal building insulation, existed between or among people from different companies.

Proof of several separate conspiracies is not proof of a single overall conspiracy unless one of the several conspiracies proved is the conspiracy charged in the indigent. If you find that the single national conspiracy alleged in the indictment has not been proven, then you must return a not guilty verdict, even though you find that some other conspiracy existed.

Court's Instructions to the Jury, at 17.

fn25 Examples of the similarities in operation of the conspiracy around the country are set forth in the Government's response to Therm-All's motion, at 23-28, and will not he repeated here.

fn26 The Court by no means condones the delays or the timing of the indictment against Supreme and Therm-All

fn27 For example in Supreme's Motion (at 5), Defendant writes that " [t]here is no evidence of any conspiratorial act - or the need for any act -- concerning Supreme after May 31, 1995,"

Fn28 More specifically, the Court instructed the jury in this regard as follows:

"On or about" and Length of Conspiracy. The indictment charges that each defendant was a member of a conspiracy that allegedly existed during the period of January 1994 until June 1995. The government does not

have to prove the exact time during which the alleged conspiracy existed. However, the government does have to prove beyond a reasonable doubt that the conspiracy charged in the indictment continued after May 31, 1995.

A Sherman Act conspiracy is deemed to continue until all its objectives have been accomplished or the conspiracy is abandoned. Thus, you may find that the alleged conspiracy continued after May 31, 1995, only if the government has proven that some action was taken by a conspirator in furtherance of the conspiracy after that date

Court's Instructions to the Jury [Doc. 256], at 17-18.

fn29 The Court does not imply that proof of the conspiracy's existence per se required an overt act. This Court examined, in connection with making oral rulings on Defendants' motions for acquittal, potential overt acts within the limitations period in order to determine if there was evidence to prove that the charged conspiracy actually continued into the limitations period. The parties' arguments that this approach is improper are rejected.

fn30 Defendants argue that Dynalectric and A-A-A were bid rigging cases and thus do not guide the present analysis This argument is rejected. The Court relies on these cases for the purpose of their reasoning on the general rules for analysis of the limitations question in § l acts, antitrust conspiracy cases. Applications of the law to the facts, i.e., determination of whether there are overt acts in the relevant time period committed in furtherance of the charged conspiracy, is a matter for the court in light of the particular charge in the indictment. This analysis is where the type of conspiracy must he

considered, and this Court will do so.

fn31 To the extent that Defendants claim they were not involved in any conspiracy at all, they may not claim the protections of withdrawal from the conspiracy

fn32 See GX 10E (summary reflects a telephone call and a fax by Engebretson's (home/business) to Ferry's home in June 1995). The Jury was entitled to rely on inferences from the telephone logs even though there was no direct evidence of the contents of or participants in the calls, See United States v. Williams. 264 F.3d 561, 574 5th Cir. 2001)

fn33 The jury was entitled to disbelieve Engebretson's claim that this behavior was to tease Ferry, and thus was innocent conduct.

fn34 The Government also points to Rhodes' testimony specifying that the Government subpoenas were served in June 1995, when he told Leif Nilsen, Mizell's plant manager in California, to conceal price sheets and other documents that Supreme had faxed to Rhodes as part of the conspiracy While Nilsen testified that he did so to protect Rhodes, in order to end the conspiracy, Rhodes said he gave the instruction so that Nilsen would not get in trouble. The jury was entitled to draw the inference that there was at least a dual purpose - concealment of the conspiracy and protection of Nilsen's friend, Rhodes. Testimony that Thompson offered Rhodes a job in the post May 31, 1995 period also has varying implications., Further, testimony by Smith that Maloof had told her to lie in the grand jury could be an effort to keep the conspiracy secret. Finally, the jury had before it testimony and evidence that Rhodes had attempted to conceal the identity of Therm-All as a co-conspirator by

covering up Mark Engebretson's name and fax number on key notes Rhodes had made. See Government Exhibit 27A; Rhodes Tr. at 497. See United States v. Mann, 161 F.3d 840, 859 (5th Cir. 1998).

Defendants, relying on Grunewald v United States, 353 U.S. 391 (1957), argue that the action of Maloof and Rhodes to copal the conspiracy are evidence of a separate conspiracy and are not evidence of continuation of the price-fixing conspiracy itself. However, Grunewald distinguishes acts of concealment in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objections have been attained. United States v. Mann, 161 F.3d 840, 859 (5th Cir. 1998). If the "nature of the conspiracy is such that concealment is part of or in furtherance of the main objectives of the conspiracy," the acts of concealment may be deemed to be in furtherance of the conspiracy for limitation purposes. Id. In this case, the conspiracy to fix prices was by its nature a secretive scheme that had to be concealed from others in order to succeed, For example, Rhodes testified that the coconspirators deliberately did not match their prices exactly so as not to raise suspicion customers. The Government evidence of acts by Rhodes and Maloof to frustrate the criminal investigation by concealing evidence of the agreement suffices to prove other acts of furtherance of that conspiracy within the limitations period. See Mann, 161 F.3d a 859.

fn35 See Court's Instructions to Jury, at 18.

fn36 The Court again emphasizes that the summaries herein are far from complete.

fn37 Supreme's Motion, at 10. Supreme argues in its

post-trial motion that the instructions on Defendant's intent were confusing because the Court instructed that "the defendant must intend to carry out the agreement (the purpose of which if, successful is to reduce competition) but does not have to intend the effect of reducing competition." Id. This is a Defendants' statements by the Court out of context and thereby conflate and confuse the topics that the arguments take certain Court carefully addressed to explain antitrust law generally and then to explain the intent required in a criminal case As to the intent element, the Court specifically instructed the jury that:

It is not unlawful to engage in unilateral conduct, even with the hope of influencing pricing or conduct of competitors, competitors, unless that conduct reflects or furthers an actual agreement or mutual understanding among competitors to raise, fix or maintain prices.

Mere similarity of prices charged does not, without more, establish the existence of a conspiracy or a defendant's membership in it., Nor is it illegal to obtain information about competitors' prices or to exchange pricing information, without more. This is because such practices maybe consistent with ordinary and proper competitive behavior in a free and open market. person or company may lawfully charge prices identical to those charged by competitors and may even copy the price lists of a competitor, or follow and conform exactly to the price policies and charges of a competitor, as long as the person or company does not do so pursuant to a price fixing agreement or mutual understanding with a competitor

Conduct that is as consistent with permissible

competition or independent action as with illegal collusion, standing alone, is not sufficient to prove that the defendant joined the conspiracy. However, it is unlawful if a defendant's pricing conduct was done pursuant to an agreement or mutual understanding between the defendant and another competitor as part of the conspiracy charged in the indictment., You should consider all the evidence, giving it the weight and credibility you think it deserves, when determining whether similarity of pricing resulted from independent acts of businesses competing freely in the open market or whether it resulted from a mutual agreement or understanding between two or more conspirators

Court's Instructions to the Jury, at 19-20. The Court also instructed the jury at Defendants' request: "Thus, the government has to prove beyond a reasonable doubt that the defendant knowingly agreed with a competitor to raise, fix and maintain prices, and that the defendant actually intended to carry out the agreement in fact." Id, at 20 (emphasis added),. The other instructions by the Court to which Defendants refer pertained to descriptions of antitrust law generally

fn38 Reply, at 23-24

fn39 Supreme cites United States v. United States Gypsum Co., 438 U.S., 422,463 -65 (1978), but that case is inapposite. The issue in Gypsum was whether there was a withdrawal from the conspiracy. Here, Defendants contended that it had not, joined any conspiracy that may have existed. Defendants were free to argue their evidence, and nothing in the charge contradicted the specifics of Defendants' theory of their defenses.,

fn40 Supreme's Reply, at 23-24.

fn41 See Court's Instructions to the Jury, at 7-8.

fn42 Therm-All's Motion, at 13.

fn43 Therm-All asserts further that the sufficiency of the evidence should be evaluated without these improperly received documents. The Court has done just that and concludes that the evidence of record, with all inferences drawn in favor of the verdict, is more than sufficient to convict Therm-All of the conspiracy charge the indictment. The evidence of communications among Rhodes, Engebretson, Ferry, and Smigel, and others, in addition to the documentary evidence and the testimony of Mingle reveal that the jury was entitled as a matter of law to find that the Government had met its burden of proof in this case against Therm-All. The jury is "free to choose among all reasonable construction of the evidence," United States v. Williams, 264 F. 3d 561, 576 (5th Cir. 2001) (quoting United States v. Garcia, 86 F. 3d 394, 398 (5th Cir. 1996)), and "it is not necessary that the evidence exclude even, reasonable hypothesis of innocence or be wholly inconsistent with even, conclusion except that of guilt.," Id. (quoting United States v. Lage, 183 F.3d 374, 382 (5th Cir. 1999)), "Our review is the limited to whether the jury's verdict was reasonable, not whether we believe it to be correct. Finally, `this standard of review is the sane regardless of whether the evidence is direct or circumstantial."' Id. (quoting Lage, 183 F.3d at 382).

fn44 Given the length of the trial in this case, and the substantial length of the Maloof trial, there against was no advantage for the Government to undertake to prove

the nationwide conspiracy against Maloof

fn45 The denial of a bill of particulars is within the sound discretion of the trial judge; this Court can reverse only when it is established that defendant was actually surprised at trial and therefore was prejudiced in his substantial rights. See Montmayor, 703 F. 2d 118.

fn46 See Supplemental Bill of Particulars [Doc. #54]

fn47 Transcript of Pretrial Conference held Nov. 30, 2000, at 19.

fn48 United States v. Danny Two Sheng Fong, Criminal No. 98-430 (S.D. Tex., Houston Div).

fn49 E.g. Id. at 20.

fn50 The Government also maintained, however, that prices to the very large customers were nevertheless affected by the price-fixing agreement because the higher the conspirators' published their prices, the higher the prices the conspirators could charge their larger customers.

fn51 This evidence also appears to contradict Supreme's contention that it did not have price sheets in early 1994.

fn52 See Supplemental Bill of Particulars [Doc.#54]

fn 53 Transcript of Pretrial Conference held Nov. 20, 2000, at 19.

54 E.g., Id. at 20,

fn55 Supreme notes that the Government's arguments were inconsistent with the evidence from Rhodes, Nilsen and Smith, who testified that they understood that "jumping brackets" was outside the agreement.

fn56 Supreme also argues that evidence concerning certain large home builders' purchases should not have been included in the Government's calculations of the percentages of sales that were on and off the price sheets. Again, this argument relates merely to the weight of the Government's evidence. Indeed, the inclusion of the home builders in the statistical calculations was the subject of cross-examination and defense witness testimony, The inclusion or non-inclusion of evidence about builders' purchases was a matter for the jury to sort out. The Court denies a new trial on this basis.

fn57 See GX 48B.

fn58 If the Court recalls correctly, its decision that the bates number be removed was due in large part to the fact that Rhodes had completed his testimony and the location where the document had been found within the Mizell files was unclear.

fn59 It is noted that Smigel admitted that no price sheets accompanied the November 1994 letter to Therm-All's customers announcing that there would be another price increase. See GX 41A.

fn60 Therm-All requested that the Court instruct:

You have heard the attorney for the Government,...during his argument yesterday and in questioning witnesses during the trial, refer to Mr.

Kaczmarek of Therm-All allegedly passing to someone from CGI a copy of a Therm-All price sheet, which has been marked as Government Exhibit 5. The Government has introduced no evidence, and there is none in this case, that Mr. Kaczmarek or any other Therm-All employee gave a Therm-All price sheet to anyone from CGI at any time. You are instructed that these questions and references by Mr. Rosman were improper, and that you must disregard them entirely. (Emphasis added.)

fn61 The Court deemed the following language, especially, to be improper. "The Government has introduced no evidence and there is none in this case, that Mr. Kaczmarek or any other Therm-All employee gave a Therm-All price sheet to anyone from CGI at any time.

fn62 The Court does not believe that the Government's error was intentional,

fn63 On venue the Court instructed:

Before you can find a defendant guilty of committing the conspiracy crime charged in the indictment, you also must find by a preponderance of the evidence that between the approximate times of January 1994 and June 1995, some action in furtherance of that conspiracy was taken within the Southern District of Texas by at least on conspirator. The Southern District of Texas includes the Counties of Austin, Brazos, Colorado, "Fayette, Fort Bend, Grimes, Harris, Madison, Montgomery, San Jacinto, Walker, Waller, and Wharton.

Proof of a matter by a preponderance of the evidence is proof that leads you to find that the matter is more likely true than not true.

Court's Charge to the Jury, at 14

fn64 The Government had a right to indict alleged conspirators in a single conspiracy together. Rule 8(b) of the Federal Rules of Criminal Procedure provides:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants maybe charged in one or more counts together or separately and all of the defendants need not be charged in each count.

fn65 Rule 14 of the Federal Rules of Criminal procedure provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order are election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on motion by a defendant for severance the court may order the attorney far the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the Government intends to introduce in evidence at the trial.

No. 02-20843

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee

v.

THERM-ALL INC; SUPREME INSULATION INC, Defendants - Appellants

July 14, 2004, Filed

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: John J Powers, III, Assistant Chief Attorney, John P Fonte, US Department of Justice, Washington, DC.

For UNITED STATES OF AMERICA, Plaintiff - Appellee: James Lee Turner, Assistant US Attorney, US Attorney's Office, Southern District of Texas, Houston, TX.

For THERM-ALL INC, Defendant - Appellant: Karl R Wetzel, Wegman, Hessler & Vanderburg, Cleveland, OH.

JUDGES: Before REAVLEY, JONES, and CLEMENT, Circuit Judges.

OPINIONBY: Clement

OPINION: ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

E B Clement
United States Circuit Judge

No. 02-20843

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

THERM-ALL, INC., Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

APPELLANTS' JOINT PETITION FOR PANEL REHEARING

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons and entities have an interest in the outcome of this case as described in the fourth sentence o Fifth Circuit Local Rule 28.2.1.

1. Appellant submitting this Petition is Supreme Insulation, Inc. ("Supreme"), which has its principal office in Kansas City, Missouri. Supreme Insulation, Inc. is a family-owned business and does not have a parent corporation. No publicly-held corporation owns 10% or more of Supreme. Its shareholders are Tula D. Thompson of Mission Hills, Kansas, and her parents, Joyce and Doug Deaton of Brown Summit North Carolina.

2. Appellant submitting this Petition is Therm-All, Inc. ("Therm-All"), which has its principal office in Cleveland, Ohio. Upon information and belief, its sole

shareholder is Robert L. Smigel.

3. Before the district court, Supreme's president, Tula D. Thompson of Mission Hills, Kansas was a defendant, but was acquitted by the jury.

4. Before the district court, Therm-All's president, Robert Smigel of Cleveland, Ohio, was a defendant, but was acquitted by the jury.

5. Appellant Supreme's attorneys at trial before the district court were David B. Gerger and Jennifer Ahlen, Foreman DeGuerin Nugent & Gerger, 300 Main Street, Houston, Texas 70402 (Mr. Gerger is now of David Gerger & Associates, 700 Louisiana Street, Suite 4200, Houston, Texas 77002); and Norman E. Siegel, Stueve Siegel Hanson & Woody, 334 West 47th Street, Suite 250, Kansas City, Missouri.

6. Appellant Supreme's attorneys on appeal are David B. Gerger, David Gerger & Associates, 700 Louisiana Street, Houston, Texas 70442; and Curtis E. Woods, Sonnenschein Nath & Rosenthal, 4520 Main, Kansas City, Missouri 641I.

7. Co-Appellant Therm-All's attorneys at trial before the district court were Thomas R. Jackson, Jones Day, 2727 North Harwood Street, Dallas, Texas 75201.; and Stephen J. Squeri, Jones Day, 901 Lakeside Avenue, Cleveland, Ohio 44114.

8. Co-Appellant Therm--All's attorney on appeal is Karl R. Wetzel, Wegman Hessler Vanderburg & O'Toole, 6055 Rockside Woods, Boulevard, Suite 240, Cleveland, Ohio 44131.

9. Before the district court, acquitted defendant Tula D. Thompson's attorneys were Curtis E. Woods and Todd McGuire, Sonnenschein Nath & Rosenthal, 4520 Main, Kansas City, Missouri 64111 (the latter is now of Stueve Siegel Hanson & Woody, 330 West 47th Street, Suite 250, Kansas City, Missouri).

10. Before the district court, acquitted defendant Robert Smigel's attorney was Karl R. Wetzel, Wegman Hessler Vanderburg & O'Toole 6055 Rockside Woods, Boulevard, Suite 204, Cleveland, Ohio 44131

11. Appellee is the United States of America.

12. Appellee's attorneys on appeal are John Fonte, Unified States Department of Justice, Antitrust Division, Appellate Section, Room 10535, 601 D Street, N.W., Washington, D.C. 24530; and Karen A. Sharp, and A. Jennifer Bray, United States Department of Justice, Antitrust Division, Dallas Office, 1601 Elm Street, Suite 4950, Dallas, Texas 75201.

13. Before the district court the attorneys for the United States were Mark R., Rosman Karen A. Sharp, and A. Jennifer Bray, United States Department of Justice, Antitrust Division, Dallas Office, 1601 Elm Street, Suite 495Q, Dallas, Texas 75201.

Curtis E. Woods
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Dated: June 25, 2004
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TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT PURSUANT TO FRAP 40(a)(2) 1

ISSUE PRESENTED 1

COURSE OF PROCEEDINGS 2

STATEMENT OF FACTS 3

ARGUMENT 6

CONCLUSION 10

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

15 U.S.C. Sec. 2,3,6

18 U.S.C. Sec. 3281 6

American Heritage College Dictionary (3d Ed. 1993) ... 8

STATEMENT PURSUANT TO FRAP 40(a)(2)

In its June 14, 2004 Opinion, the Court overlooked and misapprehended, and misstated, the testimony of Hubert Wallace Rhodes ("Rhodes"), finding it was sufficient and substantial to prove an overt act within the limitations period to prove, beyond a reasonable doubt, the subject

conspiracy's continued existence within the limitations period. In its December 3, 2003 opinion, the Court found the same testimony insufficient, conclusory, and unsubstantiated opinion which failed to prove beyond a reasonable doubt that the conspiracy continued to exist during the limitations period.

ISSUE PRESENTED

Whether the trial testimony of Government witness Hubert Wallace Rhodes was misapprehended and misstated by the Panel in its Opinion of June 14, 2004, thus leading the Panel to erroneously conclude and hold in its June 14, 2004 Opinion that the Government satisfied its burden of proving the subject conspiracy's continued existence curing the limitations period, when it previously reviewed the same testimony of Rhodes in its prior December 3, 2003 Opinion and held the same to be insufficient to so prove beyond a reasonable doubt.

COURSE OF PROCEEDINGS

On May 31, 2000, a federal grand jury sitting in Houston, Texas, indicted Therm-All Inc., Therm-All its president, Robert Smigel, Supreme Insulation, Inc. ("Supreme"), and its president, Tina Thompson for conspiracy to fix prices of metal building insulation sold in the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. R.1.

On October 17, 2001, a jury convicted Therm-All and Supreme, but acquitted Smigel and Thompson. R. 279. On July 12, 2()Q2, the district court sentenced Therm-All to pay a fine of $1,500,000 and to serve a five-year term of probation. R. .355. Supreme was sentenced on the same

date to a fine of $ 1 ,000,000 and also sentenced to five years of probation. R. 356.

Therm All and Supreme appealed their convictions to this Court.

On December 3, 2003 a majority of this Panel reversed the convictions of Therm-All and Supreme, issuing a 12-page opinion ("First Opinion"), Judge Reavley of the Panel dissented.

On January 12, 2004, the United States filed its Petition for Rehearing En Banc. This Panel asked Therm-All and Supreme to respond to the Petition. The Government requested, and this panel granted leave for it to file a reply. Therm-All and Supreme requested, and this panel granted leave to file a sur-reply.

On June 14, 2004, the Panel denied the Government's Petition for Rehearing En Banc, but granted its Petition for Panel Rehearing, withdrew its First Opinion, dated December 3, 2003, and issued a new, unanimous, opinion affirming the convictions of Therm-All and Supreme ("Second Opinion").

STATEMENT OF FACTS

In its Opinion entered on December 3, 2003 ("First opinion"), a majority of this Panel held, first, that:

We therefore bald that where a party has entered into a conspiracy in violation of Section 1 [of the Sherman Act], but has done so prior to the statue of limitations period, the government must show that during the limitations period the defendant either committed an overt act of

conspiring activity, or alternative] committed an overt act in furtherance of the conspiracy.

First Opinion at 8 (emphasis added).

Second, in the First Opinion the majority of the Panel reviewed the sufficiency of the evidence of record presented by the Government at trial to determine whether it showed, beyond a reasonable doubt, that any "overt act of conspiring activity" or any "overt act in furtherance of the conspiracy" had been committed "during the limitations period," The majority was clear and unequivocal in holding that:

The Government failed to offer evidence of any overt act supporting the inference that the conspiracy continued to exist after May 31, 1995. The five pieces of evidence that it did offer into evidence fall short of satisfying this requirement.

First Opinion at 8 (emphasis added). The majority of this Panel then proceeded to review each of the "five pieces of evidence" and held each insufficient. See First Opinion at 9-12. Specifically reviewing the testimony of chief Government witness Wallace Rhodes, the Panel majority expressly rejected the sufficiency of his testimony "that the agreement [to fix prices] lasted until June 1995," holding that it was "conclusory ," an "opinion," and that Rhodes did no testify "about any acts occuring after May 31, 1995 to substantiate [his] opinion." First Opinion at 9. The Panel majority held that Rhodes' testimony did not "offer[] evidence of any overt act within the statute of limitations. Id.

As a result, this Court reversed the judgment of

conviction.

The Government petitioned for rehearing. In its petition, the Government sought rehearing on only three specific issues:

1. Whether a conspiracy statute that otherwise does not require proof of an overt act nevertheless requires such evidence to prove that a conspiracy continued into the period of the statute of limitations.

2. Whether a conspiracy that was in existence on May 15, 1995 is presumed to continue into June 1995, in the absence of any evidence that it terminated or that any defendant withdrew from it.

3. Whether the continued use of price sheets that contained prices previously agreed on by the conspirators is evidence that the conspiracy continued into the statutory period.

Petition of the United States of America for Rehearing En Banc, at 3. Appellants responded to the Petition, first, that the law required proof, beyond a reasonable doubt, that the conspiracy continued into the period of the statute of limitations and, second, that the Government's proffered evidence o such overt acts, as set forth in its Issues Presented nos. 2 and 3, was insufficient to so prove.

Petition of the United States of America for Rehearing En Banc, at 3.

Appellants responded to the petition, first, that the law required proof, beyond a reasonable doubt, that the conspiracy continued into the period of the statute of limitations, and, second, that the Government's proffered

evidence of such overt acts, as set forth in its Issues Presented nos. 2 and 3, was insufficient to so prove.

On June 14, 2004, this Panel withdrew its First Opinion and issued its Second Opinion. In the Second Opinion, the Panel rejected the Government's argument regarding the necessity of proof of an overt act, and held, contrary to the Government's position in the trial court, an appeal, and on rehearing, that:

[W]e hold that in a price-fixing conspiracy, the government must produce evidence of the conspiracy's continued existence during the limitations period,

Second Opinion at 7-8. Further, this Panel held that in this ease:

Accordingly, the government was required to produce evidence showing the conspiracy's continued existence after May 31, 1995.

Second Opinion at 16, Or, as the Court also held: "Staffed another way, an overt act must occur within a certain time period - as defined in the statute of limitations prior to the date the indictment is brought." Second Opinion at 1D.

To the point, this Panel held in the Second Opinion that:

The Government did so [produce evidence showing the conspiracy's continued existence after May 31, 1995]. Rhodes (of Mizell Co.) testified that the conspiracy continued through June 1995. This testimony is direct evidence that the participants were involved in conspiratorial acts, i.e., the act of setting prices at agreed-upon levels, during the limitations period.

Second Opinion at 16.

As a result, the Court reversed itself and affirmed the convictions it earlier reversed.

ARGUMENT

Pursuant to FRAP 40(b), this Court overlooked and misapprehended, and thus misstated facts in this case on which it relied to hold that the government had met its burden of proof, beyond a reasonable doubt, regarding the statute of limitations.

Everyone agrees that the Sherman Act's five-year limitations period, see 18 U.S.C. § 3281, began to run here on May 31, 1995. Second Opinion at 16.

And there certainly can be no question now, after two opinions by this Court, that "[t]he statue of limitations runs from the last avert act," Second Opinion at 10, and "the Government was required to produce evidence showing the conspiracy's continued existence after May 31, 1995." Second Opinion at 16, As this Court stated in its Second Opinion: "Stated another way, an overt act must occur within a certain time period - as defined in the statute of limitations - prior to the date the indictment is brought." Second Opinion at 10.

In so holding, and rejecting the Government's argument to the contrary in its Petition for Rehearing En Banc, this Court reaffirmed its position of the First Opinion requiring the Government to produce substantial evidence of an overt act during the limitations period. This is important to note for the Cowl has maintained the same legal standard in both opinions to measure the exact

same testimony; the only difference being that the Court has inadvertently overlooked or misapprehended, and thus misstated, the testimony of Rhodes in reaching its holding in the Second Opinion.

As this Court had no difficulty in holding in its First Opinion, the record trial evidence is insufficient to so prove beyond a reasonable doubt. See First Opinion at 8-12. And this Court's reliance now in its Second Opinion on one piece of evidence, that it found in its First Opinion to be insufficient alone and in combination with other proffered evidence because it was "conclusory "opinion" and "unsubstantiated" with facts, amounts to an error of Fact and a misapprehension of fact under FRAP 44 that mandates a panel rehearing.

During Trial, the Government offered the testimony of its chief witness, Wallace Rhodes, who testified as follows:

Q. And how long did your agreement [to fix prices] last, Mr. Rhodes?

A. Until June of 1995.

Trial Transcript at 188 (emphasis added). Correctly quoting this testimony in its First Opinion, this Court found it insufficient. See First Opinion at 9 ("Rhodes opined that the agreement lasted until June 1995.")(emphasis added).

Inexplicably, however, in its Second Opinion the Panel misstates Rhodes' testimony, stating: "Rhodes (of Mizell) testified that the conspiracy continued through June 1995." Second Opinion at 16 (emphasis added).

This misapprehension and misquoting of Rhodes' testimony is not immaterial; and vitiates the key holding of the Second Opinion. "Until" does not 7 mean "through," The dictionary definition of "until" is"up to the time of "or "before" The American Heritage College Dictionary , at 1481 (3d Ed,, 1993). On the other hand, "through" is defined to mean "up to and including," and "from beginning to end." U. at 1413.

Thus, by misapprehending and misquoting Rhodes' testimony in its Second Opinion, the Court has erroneously defined and interpreted Rhodes' testimony to include the period after May 31, 1995.

The Panel majority simply got it right the first time, in its First Opinion, because it quoted and interpreted Rhodes' testimony correctly.

But more importantly, the Panel majority also got it right the first time when it held that this testimony o Rhodes, however it is interpreted, was "conclusory ," and an "opinion" that he did not substantiate with "any evidence of any overt act within the statute of limitations." First Opinion at 9.

It is axiomatic that a "conclusion" or an "opinion" is not an "act," much less an "overt act," Nor is it substantial evidence proving beyond a reasonable doubt an essential element of a crime, A mere assertion, conclusion or opinion of an ultimate fact or element without substantiation is insufficient, as this Court had no trouble holding in its First Opinion. See First Opinion at 8-12.

Moreover, the Government did not submit or argue in its Petition for Rehearing that Rhodes' testimony was sufficient to prove that the conspiracy continued within

the limitations period. In fact, it only argued two other pieces of evidence as being the proof necessary within the limitations period. See Government's Petition for Rehearing En Banc, Issues Presented Nos. 2 and 3 (first, the absence of evidence of termination of or withdrawal from conspiracy and second, assumed continued use of price sheets).

The Government thus abandoned Rhodes "until June" testimony as the basis for it passing the limitations test.

With all respect to this Court, it has reversed a clear and correct holding in its First Opinion without explanation rationale -- much less basis in the record evidence. It has inexplicably changed its holding regarding the evidence for no stated reason.

While applying the same legal analysis to the very same testimony of Rhodes, the Court now holds sufficient what it expressly held in. its First Opinion to be insufficient. Significantly, no new evidence was proffered in the Government's Petition for Rehearing En Banc to give substance with fact to Rhodes' otherwise conclusory "opinion."' No reason or rationale is given a to why what was "black" in the First Opinion is now "white."

Clearly, the Court has overlooked or misapprehended the "conclusory" "opinion" testimony of Rhodes in its Second Opinion. In so doing, the Court has eviscerated the legal standard it announced (twice) that the Government must prove an overt act within the limitations period - a standard that the Government cried was wrong and criticized in such forums as the Spring Meeting of the ABA Antitrust Section.

The harsh truth is simply this: If this type of "conclusory" "unsubstantiated" "opinion" evidence is sufficient, then

this Court's pronouncement of the law and the statute of limitations itself are rendered meaningless as a safeguard of the accused.

Justice and fundamental fairness dictate that this Panel's first and correct holding set forth in its First opinion be followed in its Second opinion and the convictions of Therm-All and Supreme be reversed, again.

The integrity of the appellate process requires no less.

CONCLUSION

This Court should withdraw its Second Opinion and reinstate its First Opinion or, in the alternative, this Court should amend its Second Opinion by holding that the testimony of Wallace Rhodes was insufficient to prove, beyond a reasonable doubt, that the subject conspiracy's continued existence after May 31, 1995.

In any event, this Court should reverse the judgments of conviction against Appellants Therm-All, Inc,, and Supreme Insulation, Inc.